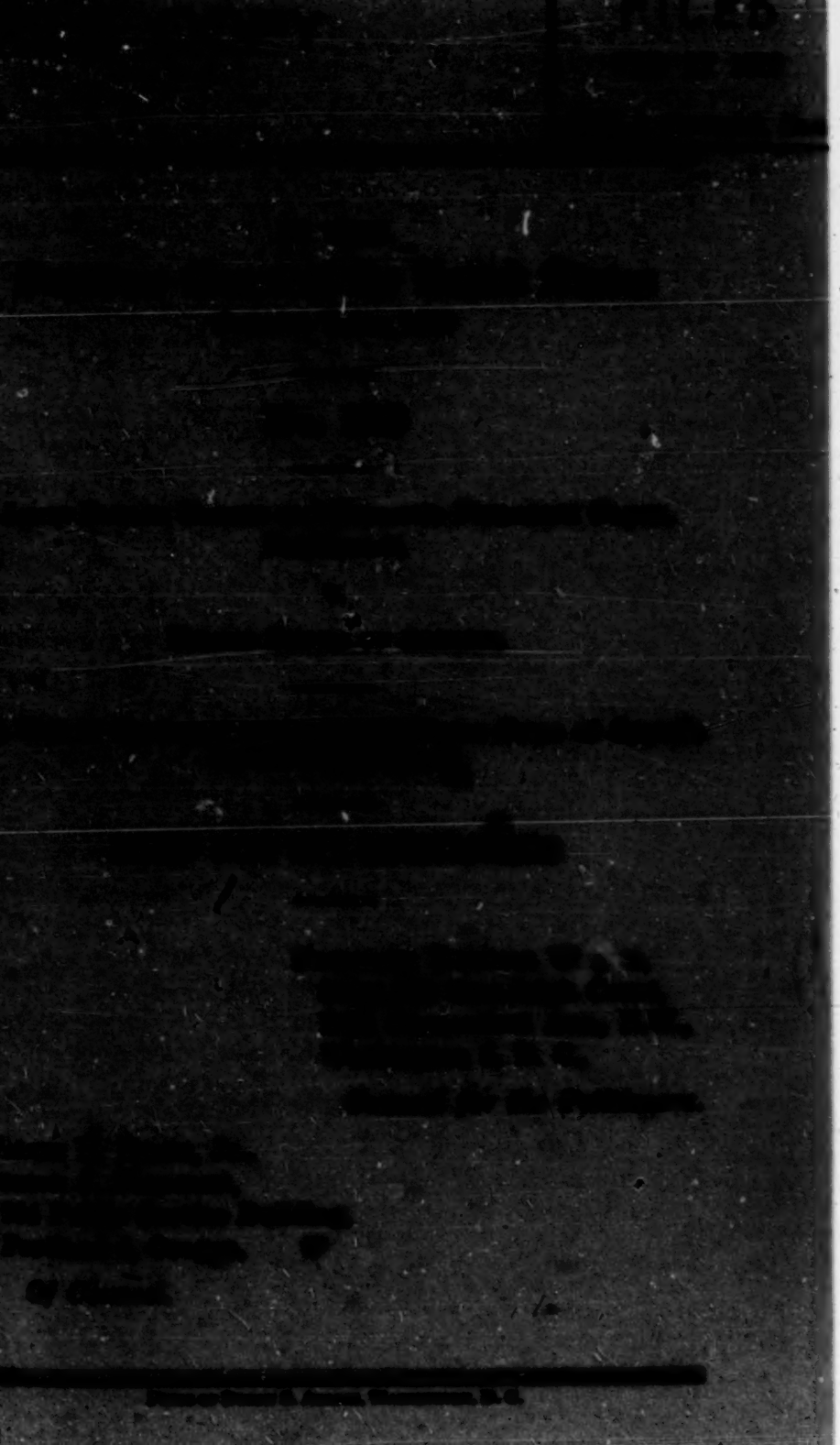

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 126

JAMES BUTLER ELKINS and RAYMOND FREDERICK CLARK,
Petitioners,

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

Ninth Circuit. The opinion of the court below in this case (R. 449-459) is reported at 266 F. 2d 588.

The opinion of the court below denying petitioners' application for a stay to enable the filing of a petition for a writ of prohibition (R. 304-306) was not reported.

The opinion of the court below denying the petitioner Clark leave to appeal *in forma pauperis* is reported at 250 F. 2d 145.

District Court. The oral opinion of the district court denying petitioners' motion to suppress (R. 278-286) was not reported.

State Courts. The opinion of the Circuit Court of the State of Oregon for Multnomah County, rendered in connection with the injunction forbidding State and County officers to testify in the United States District Court in the present case (R. 295-301), was not reported.

JURISDICTION

The judgment of the court below (R. 460) was entered on April 27, 1959. A timely petition for rehearing was denied on May 28, 1959, the day after its filing (R. 460-461). The petition for certiorari was filed on June 19, 1959, and granted on October 12, 1959 (R. 461). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTIONS INVOLVED

1. Whether the evidence used against petitioners in the Federal prosecution was obtained in violation of their rights under the Constitution of the United States.

2. Whether, if the evidence was unlawfully obtained, it was admissible in the Federal prosecution of petitioners because obtained by State officers without Federal participation.

3. Whether, after a State court has suppressed evidence that it held to be illegally seized as a matter of State law and has enjoined State and County officials from testifying concerning such evidence, a Federal conviction may thereafter be had and affirmed, where the Federal court did not undertake any independent examination of the original State seizure but assumed that it was illegal as a matter of State law and proceeded on the basis of (a) the testimony of the State officers, who were directed by the Federal court to testify notwithstanding the State court injunction, and of (b) the suppressed evidence, which was subsequently

aken from the constructive custody of the State court nder a Federal search warrant, on the footing that *Lea* v. *United States*, 350 U. S. 214, involves an application f the Supremacy Clause rather than a doctrine of eciprocity and of comity between State and Federal ourts.

4. Whether, where a motion to suppress evidence under riminal Rule 41(e) is based on the ground, *inter alia*, of he insufficiency of the affidavit on which the Federal search arrant was issued, and the District Court denies the otion on the expressed ground that the validity of that arrant is immaterial, and then cuts off proof as to whether he affidavit made a sufficient showing of probable cause, is open to the Court of Appeals to affirm the ruling enying the motion on the ground that the Federal search arrant was valid.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULE OF COURT INVOLVED

The constitutional provisions, statutes, and rule of court nvolved are set forth in the Appendix below, pp. 105-111.

STATEMENT

As in the Petition for Certiorari, this Statement is estricted to the facts bearing on the questions presented, ll of which deal with searches and seizures.

A. The initial seizure and the original State proceedings through the granting of both motions to suppress.

On the afternoon of May 17, 1956, after allegedly listening n an extension line to a telephone conversation between ne Brad Williams, a newspaper reporter, and Chief of olice Ellsworth Herder of St. Helens, Oregon, William M. angley, then District Attorney of Multnomah County, regon, executed an affidavit on information and belief R. 53, 55-59, 61). That affidavit read in pertinent part follows (R. 20-21):

"I, William M. Langley, being first duly sworn, upon oath, depose and say, upon information and belief that there is in the possession of Raymond Clark in a certain building situated on premises occupied by and under the control of the said Raymond Clark at or about 2409 S. E. Main Street, in the City of Portland, County of Multnomah, State of Oregon, certain obscene and indecent photographs with accompanying sound recordings, with intent on the part of the said Raymond Clark to exhibit said photographs.

"I further depose and say that the said Raymond Clark is in possession of the aforesaid obscene and indecent photographs with accompanying sound recordings with intent to use in violation of O.R.S. 167.150, i.e., possession of obscene pictures with intent to exhibit them.

"I further depose and say that the source of my information is Chief of Police Herder of St. Helens, Oregon."

The Raymond Clark therein mentioned is one of the present petitioners, and he is, admittedly, an employee of the petitioner Elkins.

Chief Herder denied having had any telephone conversation with Brad Williams on the afternoon of May 17, 1956 (R. 78-79). He said he had talked to Williams on the telephone one evening the week before (R. 73, 76), in which he passed on, as hearsay, information concerning Clark's supposed possession of obscene pictures (R. 77-79). Chief Herder denied having talked to Langley (R. 77), denied knowing Clark (R. 78), and stated that he had no personal knowledge of any obscene pictures in Clark's possession at the address stated in Langley's affidavit (R. 77).

Williams was not called as a witness.

At about 5 P.M. (R. 411), Langley's affidavit was taken before the Hon. John R. Mears, Presiding Judge of the

District Court of the State of Oregon for Multnomah County, who, after examining the paper, somewhat perfunctorily according to his own later statement (R. 411), issued a search warrant (R. 404-405) authorizing the search of Clark's home "for obscene photographs and sound recordings."

Sheriff Schrunk of Multnomah County received the warrant around 6 P.M. (R. 82-83), but it was not actually executed until between 8:30 and 11:30 that evening (R. 406, 408), by Deputy Sheriff Minielly.

At that time, accompanied by three uniformed officers (R. 240-241), a newspaper photographer, and two reporters, Brad Williams being one of the latter (R. 241), Minielly went to the petitioner Clark's dwelling house, and held up the warrant at the door so that Mrs. Clark could read it through the glass (R. 242-243). When she refused admission and said the officers would have to wait until her husband came home in 15 or 20 minutes (R. 243), Sheriff Minielly and Officer Heem broke down the front door and entered (R. 240).

An extensive search followed, over a two-hour period (R. 244). Doug Baker, the other newspaper reporter, pointed to a hassock (R. 249), inside which Minielly found five cardboard boxes that contained the five rolls of electronic tape now in question (R. 245-247). A note was found in each box (R. 249). Minielly took the tapes into the basement where he examined them (R. 251-252). Thereafter he carried them into his car; this was about 15 minutes after the time they were found (R. 253). Then he turned them over to Sheriff Schrunk at the courthouse (R. 253).

Minielly made a return on the search warrant stating that "I found upon the said premises pursuant to said warrant no obscene and indecent photographs with accompanying sound recordings" (R. 406), and he so

testified (R. 244, 249, 259). There were found some 24 "party records" (R. 86-87, 249, 407, 408), the precise nature of which does not appear.

Minielly and his men did however seize 26 slot machines (R. 407, 408), many spools of wire recordings, several reels of film, a projector, an amplifier, a payroll book, and numerous other items (R. 407, 408). Minielly's receipt stated that "I observed evidence of the crime of wire-tapping" (R. 407), but on the stand he admitted that he was unable to tell what if anything the tapes contained (R. 247, 250) or whether they contained intercepted telephone conversations (R. 248), and that there was no evidence to show that any of the seized articles were being used in the commission of any crime (R. 259-260).

Minielly turned the tapes over to Schrunk at the courthouse downtown (R. 87, 253) at about 1 A.M. on May 18 (R. 89). Reporter Brad Williams was there (R. 89-90), reporter Doug Baker and night editor Bob Stein came later (R. 91, 168). Also present was a radio technician, Charles Moore, who was in the employ of that same newspaper's affiliated radio station (R. 166-168).

Moore had two tape-recording machines and several rolls of blank recording tape (R. 169), and then made copies of the tapes that had been seized by Minielly (R. 98, 170-172), copying the portions that Brad Williams indicated (R. 172). One of the reporters took the copies away (R. 173). All this took place in Sheriff Schrunk's office in the courthouse with Schrunk and his deputy Minielly present (R. 168, 169, 173, 254).

Novak, another technician from the same radio station, testified to substantially the same transactions (R. 229-234), but placed the occurrence in the early morning hours of the next day (R. 229). Sheriff Schrunk, however, testified that Novak was among those present early in the morning of the 18th (R. 90-91).

That day, Friday, May 18, 1956, was primary election day in Oregon. O.R.S. 249.340. It was accordingly both a legal (O.R.S. 187.020(3)) as well as a judicial (O.R.S. 1.060) holiday. The courts were also closed on Saturday and Sunday, May 19 and 20, 1956 (R. 63).

On Monday, May 21, 1956, the first judicial day following the seizure (R. 289-290), the petitioner Clark filed, in the State District Court that had issued the search warrant, a motion to suppress the seized evidence, and to return or destroy the property (R. 21, 410). After hearing testimony, Judge Mears granted the motion to suppress, on the ground that the affidavit on which the warrant was issued was faulty, in that it was made only on information and belief (R. 24, 411-413).

In connection with his granting of the motion to suppress, Judge Mears said (R. 411-412):

> "I glanced over the affidavit; and I say 'glanced'; I did not study it because I had relied on the integrity and ability of the District Attorney. After it was sworn to I signed the search warrant and the proceedings that happened thereafter have been laid out at length in this Court.
>
> "I feel, gentlemen, that I was misled in signing the search warrant. I was perhaps in error in not meticulously examining the law and the District Attorney, but I relied upon the legal ability of the gentlemen present and did sign the search warrant. I can see that the search warrant has no greater power than the affidavit which stands behind it. I can see no further reason for continuing a hearing of this case because we always will have to go back to the affidavit, which is the original, the starting, document which I now find under the state law to be faulty."

The slot machines were ordered destroyed, as contraband (R. 24, 412, 414), while the remaining property was ordered impounded in the possession of the Sheriff of Multnomah County, to be held at and released only upon

the direction of the Attorney General of the State of Oregon or such higher Circuit or Supreme Court before whom the matter may be heard" (R. 24; see also R. 412, 414).

Pursuant to this order, the five reels of tape recordings were, on May 28, 1956, turned over to the Attorney General of the State of Oregon (R. 266, 409), and on June 4 they were placed in a safe deposit box in the First State Bank of Milwaukie that had been rented to the Oregon State Police (R. 108, 266).

Meanwhile, during the pendency of the hearing on the motion to dismiss in the State District Court, on May 21-24 (R. 21, 23, 410), these occurrences took place:

(a) The text of the conversations recorded on the seized tapes was published by the newspaper that had caused the copies to be made in the early morning hours immediately after the seizure (R. 217).

(b) On May 22, one of the five seized tapes was played back in Sheriff Schrunk's office to Ronald E. Sherk, an F.B.I. agent (R. 1, 122-126), who had been sent there at the direction of his superior, Special Agent in Charge Santoiana (R. 125-126, 276). This performance was cut short because Sherk was told by Deputy Sheriff Minielly that the Grand Jury for Multnomah County, Oregon, wanted the tapes (R. 133-134).

(c) On the same day, May 22, 1956, the Grand Jury for Multnomah County, Oregon, indicted petitioners Elkins and Clark for the offense of intercepting and obtaining telecommunications in violation of Chapter 675 of the Laws of Oregon, 1955 (*infra*, pages 108-109); see R. 17, 26, 27, 290, 427.

The record indicates that the District Attorney of Multnomah County challenged the jurisdiction of the State District Court (Mears, J.) to order suppression of the evidence once an indictment had been returned (R. 215);

see also 7 Tr. 1168-1169, 1175-1176, 1184-1187; 8 Tr. 1296-1297.[1] The State District Attorney also argued in the State District Court that that court lacked power to suppress the seized evidence because it constituted a violation of § 605 of the Federal Communications Act (R. 213).[2]

At any rate, the matter of the suppression of the evidence in question was reargued by the petitioners before the State Circuit Court (R. 290, 428)—a court of general criminal jurisdiction, see *In re Application of Loundagin*, 129 Ore. 652, 278 Pac. 950, and authorities there cited—and that court (Lonergan, P. J.) on September 17, 1956, also ordered the evidence suppressed, and also directed that the seized articles "be turned over to the Attorney General to be disposed of according to the law and by the order of this Court" (R. 25-28).

B. The Federal prosecution and the Federal motion to suppress.

Late in July 1956, while the tapes in question were in the bank in Milwaukie pursuant to the order of the State District Court, the United States Attorney for the District of Oregon ascertained from Captain Gurdane of the Oregon State Police (R. 392) that they were still being held there for the Attorney General of Oregon (R. 238-239).

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[1] References to "Tr." are to portions of the fifteen volumes of testimony taken at petitioners' trial that remain unprinted.

[2] In Def. Ex. 12, not printed, entitled "Answer to Motion to Suppress and Return or Destroy Evidence," District Attorney Langley, by his Deputy Oscar D. Howlett, said:

> "4. That the aforesaid wiretapping equipment and recordings of intercepted telephone conversations are evidence of violation of Section 605 of the Federal Communications Act, and the District Court, Multnomah County lacks power to suppress, return, or destroy evidence of a Federal crime, and any action by any person in doing so makes such person guilty of being an accessory after the fact—itself a Federal crime."

On August 13, 1956, F.B.I. Agent Sherk visited the First State Bank of Milwaukie with Captain Gurdane and Lieut. Cross of the Oregon State Police (R. 155, 174-175), and saw all five tapes in their cardboard containers, then watched all five being replaced in the safe deposit box (R. 177-178, 184-187, 267). On this occasion, Sherk did not hear any of the tapes played (R. 178).

Thereafter, on September 5, 1956, Sherk executed an affidavit for a search warrant in which he said (R. 1):

> "that heretofore, on May 22, 1956, in the State and District of Oregon, I listened to portions of electronic tape recordings of conversations, which recordings contained intercepted telephone conversations designed or intended for the use or benefit of a person or persons other than senders of such messages and the benefit of a person or persons not entitled thereto, in violation of Title 47, Section 605, U.S.C.A. I am positive said recorded conversations and evidence of such intercepted telephone messages are among five tapes of electronic tape recordings and one Minifon recording machine and four spools of Minifon recording machine wire, which said properties containing evidence of such recorded intercepted telephone conversations are located in Safety Deposit Box 912 at The First State Bank of Milwaukie, Oregon, 1036 Main Street, Milwaukie, Oregon. I further depose and say that I have personal knowledge that said properties are located on said premises and that I am positive they are so situated."

The United States Commissioner accordingly issued a search warrant (R. 2), which Sherk executed in the presence of Captain Gurdane of the Oregon State Police and F.B.I. Agent Dunn (R. 114, 187) and pursuant to which he took the five tape recordings, one Minifon recording machine, and three spools of Minifon recording machine wire (R. 3, 116-117, 190, 202, 270).

Not until after this seizure did Sherk hear the balance of the tapes played (R. 142-143), or learn that the communications recorded thereon had been intercepted with-

out the consent of the sender (R. 157-158, 190-191), or hear any of the seized spools played (R. 123, 153, 154, 190).

Thereafter, later in September 1956, District Attorney Langley of Multnomah County joined in petitioners' motion to dismiss the State wire-tapping indictment against them, on the ground that, since the State Attorney General had conceded the illegality of the original seizure, the only successful prosecution that could be successfully had was the Federal one, and that dismissal of the State indictment would facilitate the Federal prosecution (R. 224-226).[3]

On February 4, 1957, the present nine count Federal indictment followed (R. 4-11).

Count I (R. 4-7) charged a conspiracy, in violation of 18 U.S.C. § 371 "to intercept wire communications and divulge and publish the existence, contents, substance, purport, effect and meaning of said intercepted wire communications of others, without the authority of the senders of said communications," in violation of 47 U.S.C. §§ 501 and 605 (*infra*, pp. 106-107).

Counts II to IX, inclusive, alleged substantive violations of 47 U.S.C. §§ 501 and 605, each count naming different

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[3] See Def. Ex. 13, not printed, "Reply to Motion of Defendants for Dismissal of Indictment":

> "That the United States Government on September 5, 1956 seized the said evidence for prosecution by the United States Government; that the dismissal of the within indictment will facilitate the prosecution by the government of the United States."

This document was signed in District Attorney Langley's name by his deputy Howard Lonergan. It was dated September 11, 1956, but was not filed until September 25, 1956. The State indictment against petitioners was however not dismissed until March 13, 1958, long after the Federal trial, but before the appeal was finally docketed in the Court of Appeals. See 250 F. 2d 145 and unprinted United States District Court docket entries.

persons as parties to the allegedly intercepted conversations, and different persons to whom the conservations were allegedly disclosed (R. 7-11).

Thereafter, pursuant to Rule 41(e), F. R. Crim. P. (*infra*, page 111), petitioners moved in the United States District Court to suppress as evidence the property seized by Sherk, "of which the defendants herein are the owners" (R. 13). The motion to suppress (R. 13-15) set forth five grounds:

First (R. 14), that the State search warrant under which the property was originally seized by State officers had been declared illegal by the Oregon courts, and that accordingly such property could not be used in the present proceeding.

Second (R. 14), that the Federal search warrant was illegal and void "in that it is and was based upon an insufficient affidavit," so that there was no probable cause for its issuance.

Third (R. 14), that the illegality of the original State seizure rendered the evidence illegal "regardless of the manner in which the Federal authorities later obtained the same."

Fourth (R. 14-15), that the State and County officers made the unlawful search and seizure "solely for the purpose of permitting and encouraging a prosecution in the Federal Courts for the commission of a crime against the United States."

Fifth (R. 15), that the property seized was in the custody of the Oregon State courts at the time, and that the United States District Court had no jurisdiction to seize it.

The foregoing motion to suppress was supported by an affidavit and numerous exhibits (R. 16-28) that set forth the State and Federal proceedings already set forth.

Four days of hearings on this motion followed (R. 52-286), during which all the circumstances surrounding the original seizure and the execution of both the State and Federal search warrants, which are detailed *supra*, pp. 3-11, were developed. The following matters transpired during the hearings:

1. Following the testimony of Police Chief Herder (who testified that any information he gave concerning the petitioner Clark was hearsay and stated by him to be such, *supra*, p. 4), the following colloquy took place (R. 79-80):

> "The Court: Mr. Luckey, I wonder if you can advise me, does the Government concede that the search and seizure had by the State officials, the Sheriff of Multnomah County, the original seizure of these articles now sought to be suppressed, whether or not that was an illegal search and seizure? Have you taken any position about it that is binding on this Court?
>
> "Mr. Luckey [U. S. Attorney]: On that matter, Your Honor, I would suggest that the position of the Government would be that it is immaterial whether or not it was illegal. And, we wouldn't feel that it was incumbent upon us to establish the legality of that search and seizure.
>
> "On the other hand, we would not desire to redress the State processes and mark it as illegal in our view. It is a litigious question and one that we do not believe is before the Court except on, possibly, a theory of continued gain through cooperation which we believe the evidence will show is not the case here.
>
> "The Court: Well, I was just wondering how far we should go into this matter of the State seizure.
>
> "Mr. Luckey: I think we can take the position, Your Honor, without saying that we either accept or disbelieve that it was or was not an illegal search and seizure, that for the purposes of this matter we may treat it as illegal."

2. With respect to the alleged participation of the Federal officers in the original search, there was no evidence

of such participation and no evidence that any Federal officers had advance knowledge of the impending raid (R. 69-70, 79, 103-104, 204, 228, 261, 263, 269, 284), although there was uncontradicted testimony from many sources that two-way cooperation between State and Federal law enforcement agencies was the normal and usual practice (R. 100-103, 105-106, 117-119, 203-204, 262, 268).

3. While counsel for the petitioners was endeavoring to establish that Agent Sherk had insufficient personal knowledge on which to base a valid affidavit as a predicate for seizure of all the tapes, inasmuch as prior to its date he had only heard part of a single tape played (R. 123, 132-134, 143, 147-148, 191, 194), the United States Attorney objected on grounds of relevancy, on the footing that the "silver platter" doctrine (R. 195) rendered the legality or illegality of the Federal search warrant quite immaterial (R. 195-197). A lengthy colloquy followed, at the close of which the court said (R. 200-201):

> "The Court: * * * I have been listening to all of the testimony and I have reached this conclusion: that it does not make any difference in the ultimate end of this matter whether or not the F.B.I. had a valid search warrant in Mr. Sherk's possession at the time he took possession of the tapes; that if his taking possession is illegal it has to be upon some other grounds under the theory of the defendants other than the fact that he held an illegal search warrant.
>
> * * * * * *
>
> I am merely restricting this ruling to this: That in the ultimate consideration of the matter it makes no difference whether Mr. Sherk had in his possession a search warrant issued pursuant to the Federal act or not. His right of possession must be based upon some other ground than that of a valid search warrant in his possession.
>
> * * * * * *
>
> "Mr. Crawford [counsel for petitioners on the motion]: I will have to state sincerely to Your Honor that I was trying to understand the effect of Your

Honor's ruling and what it would prevent me from attempting to do.

"The Court: Well, for the instant it would prevent you from further inquiring as to the basis of knowledge —the basis for Mr. Sherk's knowledge or lack of knowledge in executing the affidavit for the search warrant. This Court doesn't care from here on out whether he ever executed an affidavit for a search warrant.

"Mr. Crawford: Will the Government admit the invalidity of the search warrant?

"The Court: No. The Government merely says that it does not make any difference whether it is invalid or valid. So, the Court will accept that theory. From here on out the Court will not concern itself with whether or not there was ever a search warrant issued upon an affidavit by Mr. Sherk."

4. While counsel for petitioners was testing Agent Sherk's ability to identify the tapes he seized under the search warrant on September 5 as the same he had seen in the Sheriff's office on May 22, the United States Attorney objected that, in order to have any standing under their motion, petitioners were required to admit that identity (R. 181-182). The following colloquy then took place (R. 182):

"The Court: Well, now, let me ask you the direct point. In your motion to suppress you assert a proprietary ownership in the tapes now in the custody of the Court?

"Mr. Crawford: That's right.

"The Court: Taken under the State's warrant. You don't repudiate that, do you?

"Mr. Crawford: No.

"The Court: Yes."

5. Immediately after the close of the four-day hearing, the trial judge (East, D.J.) delivered an oral opinion

denying the motion (R. 278-286), the gist of which was that, under the rule of *Lustig* v. *United States*, 338 U.S. 74, the illegality of the original seizure did not vitiate and taint the evidence forevermore. The following additional points were touched on in the course of the ruling:

(a) The trial judge made a finding of fact that there was no Federal participation in the original seizure, that no Federal officer had any advance notice thereof (R. 284), and that the sole purpose of the original seizure was a State prosecution (R. 284-285).

(b) The trial judge restated his earlier position regarding the immateriality of the Federal search warrant, saying (R. 278-279):

> "Now, for the reasons that were expressed the other day, this Court does not deem it necessary to decide that issue in order to determine whether or not the articles moved against are within the legal possession of this court now. Therefore, the Court will make no finding as to whether or not the affidavit prepared by the special agent Sherk was or was not sufficient for probable cause for believing the existence on the grounds of which the warrant was issued, nor will this Court determine whether or not the warrant issued upon that affidavit was legal or illegal upon its face. Nor will this Court determine that the search and the seizure made by the special agent Sherk, as he said, in the belief that he was armed with a legal search warrant was in fact a legal exercise of search and seizure under such warrant."

C. State court injunction against State officers.

Judge East announced his ruling on April 12, 1957: On the day following (R. 291), petitioners brought suit in the Circuit Court of the State of Oregon for Multnomah County, seeking a temporary restraining order to forbid the State District Attorney [Langley] and named deputies [Lonergan, Howlett], the Sheriff of Multnomah County [Schrunk] and named deputies [Minielly, Lynn, Stack-

house, Sacanti, Heem], named State Policemen [Maison, Gurdane, Cross], the State Attorney General [Thornton],[4] and "other State or County officials unknown to plaintiffs" from testifying concerning any facts learned in or as a result of the original State search and seizure which two Oregon courts had successively held to be illegal (R. 290). Following a hearing (R. 302), the State Circuit Court (Redding, J.) issued the restraining order as prayed for (R. 301-304), and wrote an opinion (R. 295-301), the substance of which was that the restraining order was warranted by the doctrine of *Rea* v. *United States*, 350 U.S. 214. The terms of the restraining order then issued were repeated in a preliminary injunction on April 19, 1956 (R. 423), which has remained in effect ever since.

D. Application to Ninth Circuit for writ of prohibition.

When, at the commencement of the Federal trial, on April 16, the State restraining order just mentioned was shown to the United States District Judge, the latter stated (R. 309) that "I have reached this firm conclusion that the order just read so far as it attempts to interfere with the process of this Court here before issue is void and is a nullity and of no force and effect."

Accordingly, petitioners made telegraphic application to the United States Court of Appeals for the Ninth Circuit for a three-day stay of the pending trial, to enable them to petition for a writ of probibition forbidding the United States District Judge from compelling the giving of testimony or the production of evidence by the officials of the County of Multnomah and of the State of Oregon named in the State Circuit Court restraining order (R. 286-294). This application was presented orally in San Francisco on April 22, 1957, the trial in Portland being suspended on that day (R. 347-351, 353-354).

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[4] For the identification of individuals not previously mentioned, see ¶ 1 of the complaint in the State Circuit Court, R. 425.

The Ninth Circuit denied the application for a stay (R. 304-306), on the ground that a writ of prohibition could not be issued (R. 306), essentially because the Court of Appeals was of the view that the doctrine of *Rea* v. *United States*, 350 U.S. 214, was not one of comity (R. 305-306). The Ninth Circuit said (R. 306) that petitioners' "right of appeal from any judgment of conviction will afford them an adequate opportunity for appellate review of such rights as they may have to an exclusion of this evidence." The *Per Curiam* opinion then handed down (R. 304-306) has never been reported.

E. Petitioners' trial in United States District Court.

As has been indicated, petitioners' trial began on April 16, 1957, and it continued (except for the adjournment on April 22 to permit the foregoing application to be presented to the Court of Appeals) for some four weeks (R. 306), including Saturday (April 20 and 27, May 4 and 11; see R. 306) and night sessions.[5]

1. Inasmuch as no question is now presented concerning the validity of the indictment or the sufficiency (as distinguished from the legality) of the evidence, it is only necessary to refer to two incidents occurring at the trial:

First, the five reels of tape recordings which petitioners had moved to suppress (R. 13-15) were admitted into evidence over their objections (Govt. Ex. 1, R. 324, 346; Govt. Ex. 2, R. 325, 353; Govt. Ex. 3, R. 326, 357; Govt. Ex. 4, R. 326-327, 359-360; Govt. Ex. 5, R. 331-332, 361; see also, as to all, R. 399-400).[6]

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[5] There were four night sessions, as follows: April 18, 7:30 P.M. to 11:45 P.M. (1 Tr. 119, 128); April 30, 7:10 P.M. to 9:00 P.M. (7 Tr. 1145, 1210); May 2, 7:00 P.M. to 9:00 P.M. (9 Tr. 1524, 1591); May 7, 7:00 P.M. to 8:30 P.M. (13 Tr. 2205, 2261).

[6] Each reel was also accompanied by containers and slips, which were given sub-numbers, and were likewise admitted (see references in text, also R. 373). Certain of the slips were photographically enlarged to facilitate proof of handwriting, were given exhibit numbers suffixed by Z, and were similarly admitted over objection. 7 Tr. 1044-1045, 1052.

Second, eight officers of the State of Oregon and of its political subdivision Multnomah County, seven of whom had been enjoined by name by the State Circuit Court from testifying concerning, *inter alia*, copies or transcripts of the tape recordings illegally seized by State officers on May 17, 1956, and thereafter ordered suppressed by two Oregon courts, were, notwithstanding the State Circuit Court's restraining order, directed by the United States District Judge to testify, over petitioners' objections:

(1) George Minielly, Deputy Sheriff of Multnomah County (R. 362-367).

Minielly had been subpoenaed by petitioners on April 9 in connection with their motion to suppress (R. 51). When he completed his testimony he was kept under subpoena at the request of petitioners' counsel,[7] but was not thereafter recalled.

Thereafter Minielly was subpoenaed as a Government witness for the trial; subpoena dated 11 April and served 12 April (R. 415).

(2) Terry D. Schrunk, Sheriff of Multnomah County at the time of the illegal seizure (R. 368-372).

He was subpoenaed by the petitioners in connection with their motion to suppress, and was not excused (1 MS 131-132), although never recalled.

Thereafter he was subpoenaed by the Government for the trial on April 11, under a subpoena that was not served until April 15 (R. 415-416).

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[7] "The Court: Are all parties concluded with this witness?

"Mr. Crawford: May we keep him under subpoena with the understanding that he will respond upon reasonable notice to a telephone call?

"The Witness: Yes, sir.

"The Court: Let the record so show." 2 MS 434.

(As in the Petition for Certiorari, "MS" refers to the unprinted portion of the transcript of proceedings on the Federal motion to suppress.)

(3) Oscar D. Howlett, Deputy District Attorney of Multnomah County (R. 373-377).

Howlett was subpoenaed by petitioners on April 9 in connection with the motion to suppress (R. 51), and was excused after testifying (2 MS 360).[8]

Thereafter, on April 29, he was subpoenaed by the Government for the trial (R. 416-417).

(4) Howard R. Lonergan, Deputy District Attorney of Multnomah County (R. 377-386).

Lonergan was subpoenaed by petitioners in connection with the motion to suppress, was held under subpoena after testifying (2 MS 376-377), but was not recalled.

The State proceeding against him seeking to enjoin him from testifying was dismissed on his representation that he had not been subpoenaed for the Federal trial (R. 302, 377-378, 383-384). Petitioners' trial counsel sought a stay from the Federal court in order that he might again be joined in the State proceeding (R. 384-385), but the ruling directing him to testify assumed that he was a party (R. 385).

Lonergan appeared at the trial pursuant to a Government subpoena dated and served on April 29 (R. 417-418).

(5) Claude F. Cross, Lieutenant of the Oregon State Police (R. 386, 388-391).

Cross was subpoenaed by petitioners in connection with the motion to suppress, was not excused (2 MS 445), but was not recalled.

He appeared at the trial pursuant to a Government subpoena dated April 11 and served April 12 (R. 418-419).

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[8] "Mr. Crawford: Your Honor, Mr. Howlett may be excused, as far as I'm concerned.

"Mr. Luckey: No objection.

"The Court: He may be excused."

(6) Vayne M. Gurdane, Captain of the Oregon State Police (R. 392-394).

Gurdane was subpoenaed by petitioners in connection with the motion to suppress, was excused by the court but agreed to respond again if telephoned (2 MS 395), and was in fact recalled (R. 269-271).

He appeared at the trial pursuant to a Government subpoena dated April 11 and served on April 12 (R. 418-419).

(7) William M. Langley, District Attorney of Multnomah County (R. 396-397).

Langley was subpoenaed by petitioners in connection with the motion to suppress, was excused after testifying with the understanding that he was still subject to the subpoena on reasonable notice (1 MS 69), but was not recalled.

He appeared at the trial pursuant to a Government subpoena dated April 11 and served on April 12 (R. 421-422).

(8) James C. Darby, sergeant of the Oregon State Police (R. 394-396).

Darby was not subpoenaed for the motion to suppress. He was not specifically named in the State restraining order, but recognized that he was included within the category of "other State or County officials" (R. 395).

He appeared at the trial pursuant to a Government subpoena dated and served on May 1 (R. 419-420).

After being ordered to do so by the court, all of these eight witnesses then testified at length.

While, as has been indicated, the sufficiency of the evidence on the counts that went to the jury is not now in issue, petitioners do not understand that the Government contends that there would be any case against them if their

motion to suppress the five reels of tape recordings had been granted, or if the United States District Judge had not directed the eight above-named State and County officials to testify in violation of the State restraining order.

2. At the close of the prosecution's case, the trial judge dismissed Counts III and IV of the indictment and overt acts 1 and 2 of Count I (R. 400). In all other respects, petitioners' motions for acquittal were denied (Docket entries, May 9 and 10; not printed).

The remaining counts were submitted to the jury, which on May 11, 1957, found both petitioners guilty on all of them (Docket entry, May 11; not printed), after deliberating for 3 hours and 20 minutes (Minute entry, May 11; not printed).

Motions for a new trial and in arrest of judgment, filed by both petitioners, were denied (Docket and Minute Entries, June 17, 1957; not printed). The motion for a new trial (R. 28-30) urged that the tape recordings (Govt. Ex. 1-5) should have been excluded (¶ VIII, R. 28-29), and that the State officers enjoined by the Oregon State courts from testifying should not have been directed by the Federal court to testify in violation of the State restraining order (¶¶ IX, XV; R. 29-30)

3. Petitioner Elkins was sentenced to be imprisoned for ten months and to pay a fine of $1,000 on Count I; to be imprisoned for ten months and to pay a fine of $1,000 on Count II; to be imprisoned for six months on each of Counts V to IX; the periods of ten months each to run consecutively; the periods of six months each to run concurrently with each other and with the second period of ten months (R. 31-32). Hence, petitioner Elkins' sentence was twenty months' confinement and a total fine of $2,000.

Petitioner Clark was sentenced to be imprisoned for four months and to pay a fine of $250 on Count I; to be

imprisoned for 60 days and to pay a fine of $250 on Count II; to be imprisoned for 60 days on each of Counts V to IX; the period of four months and the first period of 60 days to run consecutively; the remaining periods of 60 days each to run concurrently with each other and with the first period of 60 days. (R. 33-34). Hence, petitioner Clark's sentence was nearly six months' confinement (four months plus 60 days) and a total fine of $500.

By supplemental judgments, each petitioner was made liable for the Government's taxable costs (R. 41-42).

Each petitioner filed timely notices of appeal as to each judgment (R. 35-41, 43-48).

F. State contempt proceedings after conclusion of Federal trial; the Federal injunction.

Following the close of the evidence in the Federal trial, both petitioners moved in the Circuit Court of the State of Oregon for Multnomah County for an order adjudging in contempt the seven State and County officials who by testifying at the Federal trial had violated that court's restraining order, in which they were specifically named (R. 433-438).[9] This motion was made returnable on May 24 (R. 433).

The United States countered by seeking and obtaining from the United States District Court on the day before —May 23—an *ex parte* temporary restraining order forbidding petitioners from proceeding further with the contempt proceedings (R. 422-441 [complaint]; R. 441-445 [temporary restraining order]). Both the complaint of the United States (¶ IV, R. 433) and the findings in the temporary restraining order (¶ IV, R. 442) stated that the Federal subpoenas were issued after the State order that prohibited the seven named witnesses from testifying. As has been shown, pp. 19-21, *supra*, this was true only in part.

[9] The witness Darby, see p. 21, *supra*, was not included; see R. 434.

The foregoing Federal restraining order was, by its terms, in force for only 10 days (R. 445). On May 31, 1957, it was extended for an additional 10 days (R. 446), and petitioners were directed to show cause why a preliminary injunction should not issue (R. 446-447). On June 10, the temporary restraining order was continued "until October 7, 1957, or, until further application is made by either party prior thereto" (R. 448).

G. The decision of the court below.

On appeal, the Ninth Circuit affirmed (R. 449-460). Apart from rulings on questions not presented here, and numerous animadversions directed at alleged procedural irregularities on the part of petitioners and their trial counsel, the grounds of decision here material may be summarized as follows:

1. The court below held that the lawfulness of the State search and seizure need not be considered, because the record failed to show Federal participation therein. "Hence the unlawfulness of the State search and seizure, if indeed they were unlawful, did not entitle defendants to an order of the District Court suppressing the property seized" (R. 456), citing *inter alia* its decision in *Rios* v. *United States*, 256 F. 2d 173 (C.A. 9), in which certiorari had been granted the week before (359 U.S. 965), and which is now here as No. 52 of the present Term.

2. The court below held that there was no merit in petitioners' Specification 12, which challenged the District Court's compelling the testimony of the State and County officials enjoined by the Oregon State court (R. 458).[10]

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[10] As set forth in petitioners' brief in the C.A. 9 at p. 114, this read:

> "Specification of Error No. 12. The Court below erred in compelling Government witnesses Minielly, Schrunk, Howlett, Lonergan, Cross, Gurdane, Darby and Langley to testify in violation of the State court restraining order."

3. The court below considered and rejected petitioners' contention that the Federal search and seizure was unlawful, holding that the Federal search warrant had been issued in full conformity with Federal law (R. 456).

Notwithstanding the foregoing square holdings, there were alternative holdings, which are mentioned in the interests of completeness.

4. In connection with petitioners' contention that the District Court should not have required the State and County officials to testify in violation of the State restraining order, the court below said (R. 458) that Specification of Error 12 (quoted in note 10, *supra*), which related "to the admission of evidence at the trial" did not, "as required by our Rule 18 [set forth at R. 452, note 8], quote the grounds for the objections to such admission and the full substance of the evidence admitted. Hence we are not required to consider specification 12 * * *." The court below then went on to say (R. 458), "However, we have considered them and find no merit in them."

5. The court below said (R. 457) that the motion for suppression of evidence (R. 13-15) was not "based on any of the five grounds specified in subdivision (e) of Rule 41."

6. The court below said (R. 457) that "defendants were not persons aggrieved by the Federal search and seizure and had no standing to challenge the lawfulness thereof or to move the District Court to suppress the property seized." This conclusion was based on statements (R. 457) that the Federal search and seizure were made at the First State Bank of Milwaukie and not at "any house or place owned, occupied or used by defendants or either of them"; and that the motion to suppress did not say, nor did the record show, that "defendants or either of them owned or had any proprietary interest in the property seized."

"Hence"—said the court below (R. 457-458)—"we are not required to consider defendants' contention that the

Federal search and seizure were unlawful. However, we have considered it and find no merit in it."

A timely petition for rehearing was denied on the day after it was filed (R. 460-461), after which this Court granted certiorari (R. 461; 361 U.S. 810).

SUMMARY OF ARGUMENT

I. The evidence against petitioners was obtained in violation of their rights under the Constitution of the United States, because obtained through an unreasonable search and seizure.

A. The search was unreasonable because conducted pursuant to a search warrant issued on an affidavit that was made without probable cause. Langley, the affiant, had no personal knowledge, and executed his affidavit on information and belief. The source of his information was an intercepted telephone conversation between a newspaper reporter and Chief Herder; the latter's information was hearsay only and was by him stated to be hearsay. Consequently, since Langley's affidavit was based on multiple hearsay, it did not establish probable cause. The information Langley had was plainly insufficient to warrant stopping a moving automobile, much less to justify breaking into a dwelling house.

The consequent lack of probable cause is the same whether tested by the Fourth or the Fourteenth Amendments, by the Constitution of the United States or by that of the State of Oregon. Two Oregon courts held the search unlawful because undertaken pursuant to a warrant based on an insufficient affidavit. Consequently, seizure of property under the invalid warrant violated the Constitution of the United States.

B. The search was additionally unreasonable because the evidence seized consisted of non-contraband articles that were not named in the search warrant. That instru-

ment authorized a search for "obscene photographs and sound recordings"; none were found, but many other articles were taken. Some, like the slot machines, were contraband as a matter of State law and hence lawfully taken and destroyed. But the tape recordings now in question were not *per se* instrumentalities of crime and were not being used in the commission of a crime at the time of seizure. Consequently they were not subject to taking under the warrant. The search was a mere exploratory search for evidence.

C. An unreasonable search and seizure by State officers violates the Fourteenth Amendment, because freedom from unreasonable searches and seizures is a part of the concept of ordered liberty comprehended within Due Process of Law. *Wolf* v. *Colorado*, 338 U.S. 25. Accordingly a search and seizure which substantively violates the Fourth Amendment likewise violates the Fourteenth.

D. The prosecution and both courts below proceeded on the assumption that the evidence in question, which two State courts had successively ordered suppressed, had been illegally obtained. No effort was made at any stage to re-examine the State courts' holding. In a proper case re-examination by the Federal court would not be foreclosed, but on the present facts no contrary ruling could fairly have been anticipated in any forum.

II. Since the evidence was lawfully obtained, it was inadmissible in the present Federal prosecution regardless of the non-participation of Federal officers in the original search and seizure by State officers. The "silver platter" doctrine, which is to the contrary, rests on an assumption which this Court has since rejected, and has other demonstrable infirmities besides.

A. The evidence in question was also obtained in violation of State law; the original search violated the Constitution and statutes of Oregon, and may well have involved

the State misdemeanor of causing a search warrant to be issued maliciously and without probable cause.

B. Since the validity of the Federal search warrant was held to be immaterial and was not permitted to be litigated at the hearing on the motion to suppress, that warrant did not cure the unlawfulness of the original State seizure.

C. Those necessary preliminaries disposed of, petitioners proceed to demonstrate that the fruits of a State search and seizure which are unlawful under both State and Federal law are inadmissible in a Federal prosecution.

1. The assumption underlying the "silver platter" doctrine has since been rejected. The State seizure aspect of *Weeks* v. *United States*, 232 U.S. 383, 398, rested on the proposition that the Fourth Amendment did not apply to the States. But after *Wolf* v. *Colorado*, 338 U.S. 25, with its holding that the substance of the Fourth Amendment was included in the Due Process of Law of the Fourteenth Amendment, the doctrinal underpinning of the State seizure aspect of *Weeks* disappeared. *Cessante ratione legis, cessat ipsa lex.*

2. When the United States uses illegally obtained evidence, howsoever acquired, it ratifies and adopts the illegality with all of the taint thereunto appertaining. On that point it is submitted that the non-constitutional views of Holmes and Brandeis, JJ., in *Olmstead* v. *United States*, 277 U.S. 438, based on the violation of State law there involved, should now be adopted. "In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously." 277 U.S. at 485.

3. When evidence unlawfully or criminally seized by State officers is used in a Federal prosecution to obtain a Federal conviction, such evidence has in fact been gathered on behalf of the United States, and must therefore be excluded. See *Gambino* v. *United States*, 275 U.S. 310, 316-317: "The prosecution thereupon instituted by the federal authorities

was, as conducted, in effect a ratification of the arrest, search and seizure made by the [State] troopers on behalf of the United States"—the precise situation here. It does not become the United States to step into the shoes of State officers who have violated the Constitution and laws of their own State as well as the Constitution of the United States.

4. When the United States uses in a criminal prosecution evidence that is obtained through an illegal search and seizure by persons other than Federal officers, it is giving enforcement to private or State action so as to transform the search and seizure into Federal action, just as, see *Shelley* v. *Kraemer*, 334 U.S. 1, a purely private agreement is transformed into State action when it is given enforcement by State courts. Here the use of the fruits of the State seizure—the very *corpus delicti* of the Federal offense—to deprive individuals of their liberty because of a violation of Federal law, constitutes Federal action, and hence is subject to all of the limitations of the Federal Constitution.

5. Federal constitutional interests are frustrated rather than furthered by the ruling below. Here (a) the evidence was inadmissible in a State prosecution because illegally seized. Moreover (b), it would have been equally inadmissible in a Federal prosecution if similarly seized by or on behalf of Federal officers. Next (c), if thus seized by Federal officers, they would not have been permitted to transfer the evidence to State officers for purposes of State prosecution. *Rea* v. *United States*, 350 U.S. 214. On what reasoning, therefore, should the same evidence be admissible in the present situation (d), simply because transferred from State to Federal custody rather than in the other direction? After all, here the State policy against unreasonable searches and seizures is identical with the Federal policy, and the substantive offenses involved are also the same. The answer is that no sound theory of law, of social interests, of federalism, or of constitutional inter-

pretation requires that, in this fourth instance alone, the illegally seized evidence should be admissible.

6. The present case graphically demonstrates that application of the "silver platter" doctrine results in "a disreputable collision of jurisdictions" (*Orton* v. *Smith*, 18 How. 263, 266). Here, although there is no conflict between State and Federal law and policy—for Oregon and the United States are as one in their condemnation of the use of illegally seized evidence—there were no less than five conflicts between State and Federal courts because of the "silver platter" doctrine: (i) Although two State courts had, on Federal standards, suppressed the evidence, the Federal court ordered it admitted. (ii) After denial of the Federal motion to suppress, the State court enjoined State and County officers from testifying in Federal court concerning the seizure, on the authority of *Rea* v. *United States*, 350 U.S. 214. (iii) Notwithstanding the State injunction, the Federal court directed each of the enjoined witnesses to testify. (iv) Petitioners accordingly moved to cite those witnesses for contempt. (v) The Federal court enjoined further prosecution of the State contempt proceedings.

Contrariwise, if there were no "silver platter" doctrine, the matter would have been over once the Federal prosecutor conceded, as he did here, the illegality of the original State seizure.

7. Thus the "silver platter" doctrine now has neither doctrinal nor practical support. It breeds opportunities for evasion—and sneakiness. It results in a selective enforcement of the Constitution, preferring the Fourth Amendment over the Fourteenth because of happenstance. It should accordingly "be allowed a deserved repose."

III. The rule of *Rea* v. *United States*, 350 U.S. 214, to the effect that a Federal court after suppressing evidence illegally seized should enjoin a Federal officer from there-

after testifying in a State prosecution concerning the seizure, is one of comity, and is applicable *in pari materia* to State suppression of evidence followed by a Federal prosecution based on the same evidence.

A. The incidents of a race of diligence are not here involved. The Federal subpoenas under which the State witnesses appeared at the hearing on the Federal motion to suppress lapsed once that motion was denied. Thereafter, three of the eight witnesses in question were restrained by the State court before being subpoenaed for the Federal trial. If the *Rea* doctrine is one of comity, the State order was good against all the witnesses, otherwise it was without effect against any. There cannot be one result for some of the witnesses and another for the others.

B. The *Rea* case rested, not on the Supremacy Clause, but on the proposition that a Federal court should by an *in personam* decree prevent Federal officers from flouting Federal policies. See 350 U.S. at 217-218, where the gist of the decision appears; nothing therein turns on the Supremacy Clause, which indeed is not mentioned anywhere in the opinion.

C. The present case is, in every significant respect, the precise converse of *Rea;* and indeed the State court relied on *Rea* in issuing its injunction. The seized property, which in *Rea* was subject to the orders of the Federal court by statute, was here subject to the orders of the State courts by the terms of the orders of suppression. Other alleged distinctions do not add up to a difference in substance, as will be seen if the heart of the *Rea* opinion, 350 U.S. at 217-218, is paraphrased with "state" substituted for "federal" and *vice versa*, and with "State constitutional provisions" substituted for "Federal Rules."

D. To read the *Rea* rule as one of supremacy would nullify rather than effectuate basic constitutional provisions. The Supremacy Clause comes into play only where

there is conflict between Federal and State law and policy. Here the Oregon policy against unreasonable searches and seizures and against the use of illegally seized matter in evidence is identical with that of the United States. There being no conflict, the problem is one of comity. Both here and in *Rea*, the order in question was an *in personam* restraint to redress an abuse of process; in neither case did the order interfere with a prosecution by the other sovereign. This is a distinction going back at least to *Ex parte Young*, 209 U.S. 123, 163. Nor was there any effort here to direct the restrained State officers to disobey the Federal subpoenas; they were restricted only as to particular testimony, and that restriction enforced basic and fundamental Federal policies, the Fourth Amendment, the Due Process Clause of the Fourteenth, and the *Weeks* rule. Oregon is a *Weeks*-rule State. The Oregon law and policy that both Federal courts below brushed aside were therefore consistent with and in furtherance of Federal policy. Accordingly, any reliance on the Supremacy Clause to support the rulings below would pervert that provision into an instrumentality for nullifying the deeply-imbedded Federal constitutional policy against unreasonable searches and seizures.

E. Since Oregon excludes illegally seized evidence while New Mexico—where the *Rea* case arose—admits it, the present case is even stronger than *Rea* for an injunction against testifying and using the suppressed evidence in a second prosecution by a different sovereign. For while the *Rea* order ran counter to the policy of New Mexico, the order here, had it been recognized as valid, would have effectuated not only the policy of the United States but also that of Oregon.

IV. Inasmuch as the District Court ruled that the validity of the Federal search warrant was immaterial and accordingly prevented petitioners from adducing evidence to establish its invalidity, the Court of Appeals was not there-

after free to affirm that warrant's validity on the present record.

A. The holding below on that point violates the rule that an appellate court may not sustain a ruling on appeal on a factual basis left undetermined by the trier of facts. *Grunewald* v. *United States*, 353 U.S. 391. Nor is there any inconsistency between petitioners' arguments here and in the court below; there was probably enough in the record to establish the invalidity of the Federal search warrant, but, since petitioners were prevented from pursuing the matter on the footing that such invalidity was immaterial, the warrant could not thereafter be sustained as valid on appeal.

B. The court below was plainly wrong in holding that petitioners' motion to suppress was not based on any of the grounds specified in Criminal Rule 41(e), as examination of that motion clearly shows.

C. The court below was similarly wrong in holding that petitioners had no standing to file the motion to suppress. (1) Since the property was originally taken—illegally—from the petitioner Clark's home, it is plain that his right to its suppression was not diminished by its subsequent transfer from hand to hand. Nor is it material that Elkins did not live with Clark; Elkins' right to have illegally seized evidence suppressed as to him was still the same. *McDonald* v. *United States*, 335 U.S. 451, 456. (2) *Non constat* anything said in the opinion below, petitioners, both in their motion to suppress and at the hearing thereon, asserted a propriety interest in the seized property. It follows that both had ample standing to have the illegally seized evidence suppressed.

D. Finally, inasmuch as the Federal search warrant was directed at property in the constructive custody of a State court, it was invalid because in violation of the constitutional rule of comity, particularly here, where the State

court's custody furthered the Federal policy against unreasonable searches and seizures. Here the execution of the Federal search warrant not only violated settled doctrines of comity but also frustrated the Federal policy of the Fourth Amendment and of the Due Process Clause of the Fourteenth.

ARGUMENT

In this brief petitioners present precisely the same questions that they formulated in their petition, changing however the order thereof. If the Court agrees with their contentions that (a) the evidence used against them was obtained in violation of their rights under the Constitution of the United States and that (b) such evidence is accordingly inadmissible regardless of the non-participation of Federal officers in the original search and seizure by State officers, reversal must follow, and it will be unnecessary to consider what was originally petitioners' first question, viz., whether the rule of *Rea v. United States*, 350 U.S. 214, is one of comity. That question, now somewhat more logically arranged in third place, will only be reached if the Court adheres to and reaffirms the so-called "silver platter" doctrine, which—succinctly stated—holds that evidence illegally seized by State officers or private individuals is none the less admissible in a Federal prosecution, provided only that no Federal officers have participated in the original illegality.

I. THE EVIDENCE AGAINST PETITIONERS WAS OBTAINED IN VIOLATION OF THEIR RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES BECAUSE OBTAINED THROUGH AN UNREASONABLE SEARCH AND SEIZURE.

At the outset, we address ourselves to the circumstances under which the evidence was originally obtained. If, as we contend, those circumstances amounted to an unreasonable search and seizure, then, insofar as the State officers making the seizure were concerned, the Fourteenth Amendment was violated (*Wolf v. Colorado*, 338 U.S. 25), and, to

the extent that the United States itself may be deemed involved, the terms of the Fourth Amendment were violated as well. Accordingly, we address ourselves to the facts of the original taking, and to what we will show to be its two infirmities: First, the search warrant was based on an insufficient affidavit, inasmuch as the affiant lacked sufficient knowledge to constitute probable cause, and executed his affidavit only on information and belief. Second, the articles now in question were not named in the warrant, were not contraband, and hence were not subject to seizure thereunder.

A. The search was unreasonable because conducted pursuant to a search warrant issued on an affidavit that was made without probable cause, being based solely on multiple hearsay.

As has been shown (*supra*, pp. 3-4), the State search warrant was issued on the basis of an affidavit executed by the then District Attorney of Multnomah County, Oregon, one William M. Langley, who deposed on information and belief that there were in the possession of petitioner Clark, in his home "certain obscene and indecent photographs with accompanying sound recordings, with intent on the part of the said Raymond Clark to exhibit said photographs," and that the source of his information was Chief of Police Herder of St. Helens, Oregon.

Actually, Langley listened in on a telephone conversation between one Brad Williams, a reporter, and Chief Herder, without the latter's knowledge.

Chief Herder's testimony was that he had never talked to Langley, only with Williams. Herder testified that he gave Williams mere hearsay testimony, telling him that it was hearsay, and, further, that Herder himself had no personal knowledge of any obscene or indecent photographs or accompanying sound recordings in the petitioner Clark's possession. R. 72-79.

The Government did not call any witnesses to seek to establish personal knowledge on Langley's part; to the contrary, after Chief Herder was excused, the United States Attorney conceded the illegality of the seizure for purposes of the motion to suppress (R. 79-80, quoted *supra*, p. 13).

That concession was fully justified; an affidavit based on multiple hearsay, as this one was, plainly does not establish probable cause. As this Court has said (*Grau* v. *United States*, 287 U.S. 124, 128),

> "A search warrant may issue only upon evidence which would be competent in the trial of the offense before a jury * * * and would lead a man of prudence and caution to believe that the offense has been committed:"

Again (*Nathanson* v. *United States*, 290 U.S. 41, 47),

> "'Under the Fourth Amendment, an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefor from facts or circumstances presented to him under oath or affirmation."

See also *Sgro* v. *United States*, 287 U.S. 206.

It is true that, in determining whether probable cause exists sufficient for an arrest without a warrant, hearsay may be enough when coupled with other information. Thus only at the last Term, this Court said in *Draper* v. *United States*, 358 U.S. 307, 313:

> "'In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' *Brinegar* v. *United States*, [338 U.S. 160] *supra*, at 175. Probable cause exists where 'the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] suffi-

cient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed. *Carroll* v. *United States*, 267 U.S. 132, 162."

But, in *Draper*, matter that was hearsay to the arresting agent, Marsh, was not hearsay to his informant. Similarly, in *Brinegar* "There was hearsay, but there was much more." 338 U.S. at 172. Likewise, in *Carroll* "the facts within the officers' knowledge when they intercepted the Carroll defendants amounted to more than mere suspicion and constituted probable cause for their action." *Brinegar*, 338 U.S. at 177.

Here, however, all that Langley had was Chief Herder's admitted hearsay, mere suspicion, which was plainly not sufficient to warrant a man of reasonable caution in believing that an offense had been committed so as to justify breaking into a dwelling house. Indeed, the information in Langley's possession did not meet the requirements for probable cause as restated only during the present Term in *Henry* v. *United States*, 361 U.S. 98, a case which involved the stopping of an automobile.

Consequently, whether or not what was said in *Grau*, *loc. cit. supra*, is still the law even as to search warrants (see the discussion in *Brinegar*, 338 U.S. at 174-175, note 13), it is plain that the multiple hearsay here involved is insufficient to constitute probable cause for any purposes—and indeed, the contrary was not seriously contended below at any time.

The constitutional norm is not different if the meaning of "probable cause" is tested by the commands of the Fourteenth Amendment under *Wolf* v. *Colorado*, 338 U.S. 25, since the the Federal requirement for an affidavit resting on probable cause differs not one whit for the State requirment here in question.

Article I, Section 9 of the Constitution of Oregon forbids, in language substantially identical with that of the

Fourth Amendment, the issuance of search warrants except on affidavits that make a showing of probable cause. An Oregon statute (O.R.S. 141.030; *infra*, p. 108) restates the constitutional prohibition. Another Oregon statute (O.R.S. 141.090; *infra*, p. 108) parallels the Federal criminal sanction (18 U.S.C. § 2235; *infra*, p. 106) against search warrants procured to be issued maliciously and without probable cause. See *Shaw* v. *Moon*, 117 Ore. 558, 245 Pac. 318. And the Oregon decisions recognize the invalidity of search warrants issued upon inadequate affidavits. *Nally* v. *Richmond*, 105 Ore. 462, 209 Pac. 871; *State* v. *Quartier*, 114 Ore. 657, 236 Pac. 746; *State* v. *McDaniel*, 115 Ore. 187, 193-194, 231 Pac. 965, 967, 237 Pac. 373; *State* v. *Flynn*, 137 Ore. 8, 299 Pac. 694, 300 Pac. 1024. An affidavit based only on information and belief is insufficient for the issuance of a search warrant. *State* v. *Quartier*, 114 Ore. at 664, 236 Pac. at 748.

In this very case two Oregon courts gave effect to the Fourteenth Amendment by holding the search and seizure invalid because undertaken pursuant to a search warrant that rested on an affidavit without probable cause. Significantly, Judge Mears, the very State district judge who had issued the warrant, stated after hearing the evidence concerning Langley's affidavit that he would never have issued the warrant had the true facts been disclosed to him. See R. 411-412, quoted above at p. 7.

It follows that, the warrant being invalid, seizure of property thereunder violated the Constitution of the United States.

B. The search was additionally unreasonable because the evidence seized consisted of non-contraband articles that were not named in the search warrant.

The orginal search warrant in this case authorized a search for "obscene photographs and sound recordings" (Def. Ex. 15, R. 404). In fact, the State officers seized a

vast collection of articles, which, while including "no obscene and indecent photographs with accompanying sound recordings" (R. 406), included the five tape recordings that petitioners thereafter moved to suppress (R. 407-408).

Right on the face of the record, therefore, the search was an unreasonable one, because it extended to articles not named in the warrant. As this Court said in *Marron* v. *United States*, 275 U.S. 192, 196,

> "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant."

The foregoing principle has since been codified by Rule 41(e), F.R. Crim. P., which lists as the third of five grounds for suppressing evidence, that—

> "(3) the property seized is not that described in the warrant."

This rule is subject to a narrow exception: Regardless of the scope of the warrant, officers engaged in a lawful search are free to seize articles that are contraband, and articles that constitute instrumentalities of crime. *Harris* v. *United States*, 331 U.S. 145, 154-155; *Steele* v. *United States* (*No. 1*), 267 U.S. 498; see *Zap* v. *United States*, 328 U.S. 624, 630, 632: "If in the course of a valid search, materials are uncovered, the very possession or concealment of which is a crime, they may be seized."

No doubt the *Harris* case represents the extreme limit of latitude allowed the prosecution. But there is no need to consider here how far its holding still has validity, cf. (*Anne*) *Johnson* v. *United States*, 333 U.S. 10; *Kremen* v. *United States*, 353 U.S. 346, because it is plain that the articles now in question did not and could not come within the exception.

Some of the seized articles did; e.g., the slot machines, which were ordered destroyed by the State court. See O.R.S. 167.535 and 167.540. But tape recordings cannot be equated with burglars' tools or counterfeiting or gambling paraphernalia (*Adams* v. *New York*, 192 U.S. 585, 598; *United States* v. *Old Dominion Warehouse*, 10 F. 2d 736, 738 (C.A. 2)), neither are they contraband like narcotics (*Rea* v. *United States*, 350 U.S. 214), intoxicating liquor in the prohibition era (*Steele* v. *United States* (*No. 1*), 267 U.S. 498) or the Selective Service documents that were involved in the *Harris* case. Tape recordings are not contraband, their possession is not unlawful, and they are not *per se* instrumentalities of crime, being as susceptible to a lawful use as to effectuating an interception forbidden by State or Federal law. To call the five spools of tape here in question instrumentalities of crime would be on a par with thus characterizing a silver teaspoon on the footing that it could conceivably be used to administer poison or habit-forming drugs.

Oregon recognizes that an officer has the right "to seize property that he discovers by his own senses is being then and there used as an instrumentality in the commission of a crime." *State* v. *Muetzel*, 121 Ore. 561, 565, 254 Pac. 1010, 1011. Cf. *United States* v. *Rabinowitz*, 339 U.S. 56. But here, as Minielly's testimony plainly showed, no crime was being committed in his presence when, after he had raised the lid of the hassock at the suggestion of the newspaper reporter who accompanied him (R. 249-250), he saw the five boxes that contained the five electronic tapes now in issue (R. 247, 248, 250).

Interestingly enough, one of the defenses made by the District Attorney in the State District Court to petitioner Clark's motion to suppress was that "None of the aforementioned wiretapping equipment, recordings of intercepted telephone communications or slot machines were seized pursuant to search warrant issued by Hon. John

R. Mears." Par. 5 of Def. Ex. 12 (R. 213; not printed). While, as above indicated, this may well have been a good defense as to the slot machines, it was plainly insufficient as to the electronic tapes.

The result is that, inasmuch as the articles seized and introduced in evidence were neither named in the search warrant nor within the narrow exception of contraband and instrumentalities of crime, the search was likewise unreasonable. It was an exploratory search for evidence, purely and simply, precisely like those condemned in *Go-Bart Co.* v. *United States*, 282 U.S. 344, and in *United States* v. *Lefkowitz*, 285 U.S. 452. Accordingly, the evidence now in question was seized in violation of petitioners' rights under the Federal Constitution.

C. An unreasonable search and seizure by State officers violates the Constitution of the United States.

We think it well to make explicit what up to now has perhaps remained only implicit, namely, that an unreasonable search and seizure on the part of State officers, while not in terms a violation of the Fourth Amendment, is none the less a violation of another part of the Constitution of the United States—the Fourteenth Amendment.

The first ten Amendments, of course, limit only the United States, and not the States; an unbroken line of opinions, from *Barron* v. *Baltimore*, 7 Pet. 243, through *Adamson* v. *California*, 332 U.S. 46, and *Wolf* v. *Colorado*, 338 U.S. 25, so holds. Accordingly, when State seizures used in Federal prosecutions were first complained of in this Court, the complaints met short shrift.

In *National Safe Deposit Co.* v. *Stead*, 232 U.S. 58, 71, the Court said:

> "The objection that the act, in directing the state officers to inspect the contents of the box, operates as an unreasonable search and seizure, raises no Federal question, since the prohibition on that subject in

the 4th Amendment does not apply to the states. *Ohio ex rel. Lloyd* v. *Dollison*, 194 U.S. 447."

Less than two months later, in *Weeks* v. *United States*, 232 U.S. 383, 398, the Court suppressed evidence illegally seized by Federal officers, but refused to suppress evidence similarly seized by State officers, saying,

> "What remedies the defendant may have against them we need not inquire, as the 4th Amendment is not directed to individual misconduct of such officials. Its limitations reach the Federal government and its agencies. *Boyd case*, 116 U.S. 616, and see *Twining* v. *New Jersey*, 211 U.S. 78."

Thereafter, beginning in 1925, the process of absorption began, and the Fourteenth Amendment was deemed to include, not *eo nomine* but in substance and as a part or aspect of the concept of Due Process of Law, many of the guarantees specifically found only in the first eight. See *New York* v. *Gitlow*, 268 U.S. 652, 666 (1925); cf. *Gilbert* v. *Minnesota*, 254 U.S. 325, 332, 343 (1920); *Prudential Insurance Co.* v. *Cheek*, 259 U.S. 530, 543 (1922); see Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 Harv. L. Rev. 431 (1926). Without stopping to list the substantive guarantees that have since been deemed included within or excluded from the Due Process Clause of the Fourteenth Amendment since the decision in the *Gitlow* case, it is sufficient simply to note here that in 1949 Due Process was held to include the right to be secure from unreasonable searches and seizures. *Wolf* v. *Colorado*, 338 U.S. 25. This Court said (338 U.S. at 27 28):

> "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search,

without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples.

"Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment. * * * "

We need not stop to inquire whether the facts presented in *Irvine* v. *California*, 347 U.S. 128, would still evoke from this Court the answer then given, for at least two reasons. First, the Supreme Court of California since the date of that decision has adopted the exclusionary rule of the *Weeks* case, see *People* v. *Cahan*, 44 Cal. 2d 434, 282 P. 2d 905, so that conviction on such a set of facts would not now be sustained by the California courts. Second, nothing in *Irvine* is contrary to the proposition now advanced here, that a search and seizure which substantively violates the Fourth Amendment likewise violates the Fourteenth. *Irvine* held, following *Wolf*, that the Fourteenth Amendment did not require the States to adopt the *Weeks* rule, a question of course not presented by the Federal prosecution here involved; and further held that the vicious character of the intrusion by the States officers did not bring the case within the rule of *Rochin* v. *California*, 342 U.S. 165, a matter which is similarly not in issue here.

Indeed, only at its last Term, this Court in effect reaffirmed the view we now urge, namely, that the test of what constitutes a proper search by State officers within the Fourteenth Amendment is to be judged by what would be a proper search under the standards of the Fourth Amendment. *Frank* v. *Maryland*, 359 U.S. 360. While the Court was sharply divided as to the merits, every member agreed on the identity of the yardstick.

It follows that, in the present case, the search and seizure by the State officers in petitioner Clark's home, a preformance which plainly did not measure up to the requirements of the Fourth Amendment, was in consequence equally improper when measured by those of the Fourteenth.

D. The prosecution and both courts below proceeded on the assumption that the evidence in question, which two State courts had successively ordered suppressed, had been illegally obtained.

1. After Chief Herder was excused (R. 79)—and it was his testimony (R. 72-79) which had demonstrated the utter lack of foundation for the affidavit (R. 20-21) underlying the search warrant (R. 404-405) pursuant to which the evidence here in question was first seized—the United States District Judge hearing petitioners' motion to suppress under Criminal Rule 41(e) inquired of the United States Attorney whether the Government was prepared to concede the illegality of the State seizure. The answer then made, and never thereafter sought to be qualified, was that "for the purposes of this matter we may treat it as illegal." See the colloquy at R. 79-80, the essential portions of which are set forth above, p. 13.

2. In denying petitioners' motion to suppress, the Federal District Court indicated that it adopted the rule in *Byars* v. *United States*, 273 U.S. 28, 33, that

> "We do not question the right of the federal government to avail itself of evidence improperly seized by state officers operating entirely upon their own account."

3. The Court of Appeals said (R. 456) that "the question of the lawfulness of the State search and seizure need not be considered," citing half a dozen cases (note 17) of which its own decision in *Rios* v. *United States*, 256 F. 2d 173—now here as No. 52 of the present Term—was the

last. And in *Rios* the court below had said (256 F. 2d at 177),

> "The 'silver platter' doctrine operates on the assumption that the illegality of the state seizure has been established."

4. Accordingly, we believe it fair to summarize the situation by saying that the prosecution and both courts below, while stressing the immateriality of the legality of the original State seizure, actually proceeded on the assumption that it was illegal. In view of the circumstances that two State courts had successively suppressed the fruits of that seizure, and that, unlike *Rios*, no attempt was made by the Government to establish independently the validity of the State seizure, it is plain that the assumption of illegality thus made cannot fairly be characterized as being in any sense a violent one.

At any rate, it is plain that on this record there is no occasion to consider the reexamination issue which is squarely raised in *Rios*.

On principle it would seem that, since the inquiry at this juncture is whether a Federal constitutional right has been violated, the holding of a State court that there was a violation, while of course entitled to respect, would not preclude independent examination of the issue in the Federal court, and that the Federal court may therefore examine the question *de novo*, on the basis of either the same or a more complete record. We are therefore disposed to agree that the course followed by the United States District Court in *Rios* was proper, nor do we read that petitioner's brief in No. 52 as questioning the right to reexamine, however much the petitioner Rios disagrees with the result reached after reexamination.

In the present case, however, neither the prosecution nor the two courts below undertook a reexamination of the successive rulings by two Oregon courts that the original

search and seizure had been illegal; instead, all three assumed that those rulings were correct. We cannot forbear to add that, in view of what has already been set forth above, no holding to the contrary could fairly have been anticipated in any forum.

II. SINCE THE EVIDENCE WAS UNLAWFULLY OBTAINED, IT WAS INADMISSIBLE IN THE PRESENT FEDERAL PROSECUTION REGARDLESS OF THE NON-PARTICIPATION OF FEDERAL OFFICERS IN THE ORIGINAL SEARCH AND SEIZURE BY STATE OFFICERS.

Under this heading, petitioners frankly attack the "silver platter" doctrine, so-called, under which the fruits of an illegal search and seizure are deemed admissible in a Federal prosecution provided only that no Federal officer participates in the original illegal enterprise.

This rule is well-settled so far as most of the lower Federal courts are concerned, and the District of Columbia Circuit's holding to the contrary in *Hanna* v. *United States*, 260 F. 2d 723 (overruling *Shelton* v. *United States*, 169 F. 2d 665 (D.C. Cir.), certiorari denied, 335 U.S. 834) must be regarded as a new departure, standing virtually alone.[1]

[1] We cannot at all agree with the Solicitor General (letter to the Clerk of this Court, Dec. 1, 1958, in *Rios* v. *United States*, now No. 32, this Term) that the decision in *Hanna* is simply to be read "as laying down a rule of evidence which the Court of Appeals has formulated for the District of Columbia under its special supervisory powers."

To begin with, the *Hanna* opinion discusses constitutional issues of the same sort and substance that we discuss here and that the petitioner in *Rios* has already presented; nothing in the opinion indicates that the result was rested on any peculiarities, real or supposed, of District of Columbia law. The sentence (260 F. 2d at 728) reading "On principle and as a matter of sound policy in the administration of judicial proceedings in the District of Columbia we think all evidence obtained by violation of the Constitution should be excluded" injects a makeweight at variance with all of the balance of the opinion.

And, second, since the District of Columbia is now both a circuit and a district (28 U.S.C. §§ 41, 88), since its judicial

But, so far as this Court is concerned, there are only two square holdings that evidence illegally seized by State officers on their own is admissible in Federal prosecutions. One is *Weeks* v. *United States*, 232 U.S. 383, 398, the other is the *per curiam* in *Center* v. *United States*, 267 U.S. 575. *Burdeau* v. *McDowell*, 256 U.S. 465, involved a theft by private persons. All the other cases that support the rule do so only by way of dictum, of which *Lustig* v. *United States*, 338 U.S. 74, 78-79, is now most frequently cited, no doubt because the prevailing opinion—there was no opinion of the Court—first used the "silver platter" expression, which, as the present record amply shows, now does service as a shorthand statement of the rule.

We submit that the "silver platter" doctrine should now be abandoned: It rested on an assumption which this Court has since rejected; it is unsound in principle, because it places the United States in the unsavory position of utilizing the fruits of a violation of the Constitution to redress a violation of the law; it impairs constitutional values; it frustrates State policies that are in harmony with those of the Federal constitution; and, as the present record amply demonstrates, it breeds unseemly conflicts between State and Federal courts.

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system was further integrated into the Federal system by the Act of May 24, 1949, c. 139, 63 Stat. 89, and since its district court is equally subject to Criminal Rule 26, we submit that prior expressions as to the separateness of the District of Columbia (e.g., *Fisher* v. *United States*, 328 U.S. 463; *Griffin* v. *United States*, 336 U.S. 704) require reexamination in the light of those factors, certainly where the alleged differences between District of Columbia law and Federal law generally do not flow from a statutory differentiation. Cf. *District of Columbia* v. *Little*, 339 U.S. 1; *Carroll* v. *United States*, 354 U.S. 394.

In *Hanna*, the holding that the fruits of an illegal search and seizure by State officers are inadmissible in a Federal prosecution was rested on principle, a principle drawn from the Constitution. On such an issue there cannot in our view be one rule for the District of Columbia Circuit and another for the other ten.

We will proceed to a demonstration of the case against the "silver platter" doctrine after first dealing with two essential preliminaries.

A. The evidence in question was also obtained in violation of State law.

Not only were the tape recordings now in issue obtained in violation of petitioners' rights under the Constitution of the United States, as we have amply demonstrated in Point I, *supra*, pp. 34-46, they were also obtained by officers of the State of Oregon in violation of the Constitution and laws of that State.

Article I, Section 9, of the Oregon Constitution (*infra*, p. 105) prohibits, in words obviously drawn from and virtually identical with the text of the Fourth Amendment, the issuance of search warrants except on affidavits that make a showing of probable cause.

That provision of the State Constitution has been implemented by both the legislative and judicial departments of Oregon.

The Oregon legislature has declared that a search warrant cannot be issued but upon probable cause. O.R.S. 141.030 (*infra*, p. 108).

And the Supreme Court of Oregon has repeatedly held that the lack of probable cause in the affidavit supporting a search warrant renders that warrant void. *Nally* v. *Richmond*, 105 Ore. 462, 209 Pac. 871; *State* v. *Quartier*, 114 Ore. 657, 236 Pac. 746; *State* v. *McDaniel*, 115 Ore. 187, 193-194, 231 Pac. 965, 967, 237 Pac. 373; *State* v. *Flynn*, 137 Ore. 8, 299 Pac. 694, 300 Pac. 1024.

Finally two Oregon courts in this case, the State District Court (Mears, J.) and the State Circuit Court (Lonergan, P. J.), successively held invalid the original State seizure involved in this case, on the express ground that the search warrant was defective because the maker of the

supporting affidavit lacked personal knowledge sufficient to constitute probable cause.

Under Oregon law (O.R.S. 141.090; *infra*, p. 108), it is a misdemeanor to procure a search warrant to be issued "maliciously and without probable cause." The record made at the trial strongly suggests that the original affiant in the present case, the then District Attorney, Langley, struck at the petitioner Clark because of strong feelings of resentment harbored against his employer, the petitioner Elkins.[2]

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[2] The extent of those feelings of resentment appear from these excerpts from the cross-examination of Langley (9 Tr. 1517, 10 Tr. 1671):

"Q Didn't you cause a narcotics warrant to be issued for Mr. Elkins and try and get a police officer to serve it with instructions that it was a bum beef but you thought he had a gun and then you could have a good pinch on him for carrying a gun?

"A That's not exactly correct. I first suggested that Mr. Elkins be arrested for violation of a traffic ordinance and in connection with that arrest that he be searched and if he had a gun on him then he would have the gun as evidence and you could charge him with being an ex-con in possession of a gun. That's one incident. . . .

. . . . . .

"Q That's the way you felt about Mr. Elkins, isn't it, Mr. Langley?

"A What is that?

"Q That nothing personal; if you had the facts you would prosecute and if you didn't why, you wouldn't?

"A Yeah; I feel that way. I feel that way.

"Q Is that why you suggested he be picked up on a traffic charge and maybe you could convict him for life imprisonment in the penitentiary?

"A That's correct, if we had the facts.

"Q So, you suggested to the officers that they go out and arrest him on a traffic charge and if they did that you hoped that you could find a gun on him and have him committed to the Oregon State Penitentiary for life imprisonment?

"A That's correct—I don't know as I suggested that to the officers, but it was in my mind."

Since however, the question whether circumstances of the original State search and seizure involved a violation of the State criminal law was never litigated at any stage, the argument which follows does not rest on the proposition that the evidence in question was, in addition to its other infirmities, obtained in the perpetration of a misdemeanor.

We have no doubt that a Federal court would not be concluded by a prior State court determination that particular evidence was obtained in violation of State law, certainly where the State court had applied an erroneous measure of constitutionality, cf. *West Virginia* v. *Sims*, 341 U.S. 22, or, even more clearly, where operation of the State law would frustrate Federal policies or even violate the Federal Constitution. Here, of course, the State law and the State policy implement both the Due Process Clause of the Fourteenth Amendment and the deeply imbedded policy of the Fourth. Moreover, here the Federal district judge determined that the illegality of the original seizure as a matter of State law was immaterial. Accordingly, the reexamination question does not arise on this record.

B. Since the validity of the Federal search warrant was held immaterial and was therefore not allowed to be further litigated at the hearing on the motion to suppress, that warrant did not cure the unlawfulness of the original State seizure.

As has been shown, the United States District Judge hearing petitioners' motion to suppress said that it made no difference whether the Federal search warrant, pursuant to which the United States (through F. B. I. Agent Sherk) took possession of the evidence now in question, was valid or not. The district judge said (R. 201), "His right of possession must be based upon some other ground than that of a valid search warrant in his possession." Accordingly, the trial judge cut off petitioners' inquiry as to

whether Sherk had probable cause for executing the affidavit pursuant to which the Federal search warrant was issued (R. 201)—the second ground of alleged invalidity set forth in petitioners' motion to suppress (R. 14)—and at the close of the hearing expressly ruled that the court would make no finding as to the sufficiency of that affidavit nor any determination as to whether the Federal search warrant was legal or illegal on its face (R. 278-279).

We point out below, pp. 91-96, 101-103, that the Federal warrant was a nullity because directed at property which was then in the constructive possession of a State court, and that in any event the Court of Appeals was not free to sustain the validity of the warrant on factual grounds which the District Court had not permitted to be litigated. But it is not necessary to reach and decide those issues at the present juncture.

The question now is whether evidence illegally seized by State officers without Federal participation may be used in a Federal prosecution. The courts below answered that question in the affirmative; we believe that precisely the contrary answer was required. On this record, the Federal search warrant was disregarded at the trial level, and its validity was not permitted to be litigated. Accordingly, we submit that it cannot be availed of here, and that the soundness or otherwise of the "silver platter" doctrine is inescapably presented. We therefore address ourselves to that question, which is the heart of the first part of the case, and which, if determined in petitioners' favor, renders unnecessary any consideration of the second major portion, viz., the inquiry whether the rule of *Rea* v. *United States*, 350 U.S. 214, is one of comity.

C. The fruits of a State search and seizure unlawful under both State and Federal law are inadmissible in a Federal prosecution.

1. The assumption underlying the "silver platter" doctrine has since been rejected by this Court.

The "silver platter" doctrine rests on the second holding in *Weeks* v. *United States*, 232 U.S. 383, 398, to the effect that the evidence in that case seized by State officers on their own was not subject to suppression. As has been shown, that holding rested on the proposition that the Fourth Amendment did not bind the States, a proposition which was still law when the State seizure aspect of *Weeks* was followed in a *per curiam* (*Center* v. *United States*, 267 U.S. 575) and when it was restated by way of dictum (*Byars* v. *United States*, 273 U.S. 28, 33, quoted *supra*, p. 44; *Feldman* v. *United States*, 322 U.S. 487, 492) or assumed and distinguished (*Gambino* v. *United States*, 275 U.S. 310). Until 1949, accordingly, the "silver platter" doctrine rested on a firm doctrinal foundation.

Then came *Wolf* v. *Colorado*, 338 U.S. 25, with its holding that the substance of the Fourth Amendment was a part of the Due Process of Law guaranteed by the Fourteenth Amendment against invasion by State action. At this point, the doctrinal underpinning of the State seizure aspect of *Weeks* disappeared, as indeed Judge Hastie pointed out in *Hanna* v. *United States*, 260 F. 2d 723 (D.C. Cir.), *supra*, p. 46, the case in which the District of Columbia Circuit overruled its earlier espousal of the "silver platter" doctrine in *Shelton* v. *United States*, 169 F. 2d 665 (D.C. Cir.), certiorari denied, 335 U.S. 834. *Cessante ratione legis, cessat ipsa lex*; cf. *Funk* v. *United States*, 290 U.S. 371, 381-385; Criminal Rule 26.[3]

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[3] "* * * The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

At first blush Judge Hastie's conclusion may be questioned; it may be thought that *Wolf* could not have undercut the State seizure aspect of *Weeks*, since *Wolf* was decided on the same day as *Lustig*, the case which coined the "silver platter" expression; and that if *Wolf* actually spelled the demise of the "silver platter" doctrine, then the concurring opinion in *Lustig* of Murphy, Douglas, and Rutledge, JJ. (338 U.S. at 80) should have been the prevailing opinion in that case.

To this suggestion there are a number of answers:

First, there was no opinion of the Court in *Lustig*, a circumstance which indeed impairs its weight as a precedent under the unquestioned rule. *United States* v. *Pink*, 315 U.S. 203, 216; *Hertz* v. *Woodman*, 218 U.S. 205, 212-214.

Second, the prevailing opinion in *Lustig* expressly disclaimed passing on the present issue, saying (338 U.S. at 79), "Where there is participation on the part of federal officers it is not necessary to consider what would be the result if the search had been conducted entirely by State officers."

And, third, the full reach of all the implications of a holding as far-reaching as that in *Wolf*, which for the first time included the substance of the Fourth Amendment within the Fourteenth Amendment's Due Process Clause, could not have been perceived at the outset. Certainly the proposition now in question could not possibly have been argued by counsel, since at the time of the *Lustig* argument *Wolf* had not yet been decided. Significantly enough, the concurring opinion in *Lustig*, while reaching the result for which we contend, did not place that result on the grounds articulated here and in Judge Hastie's opinion in *Hanna*.

It is also interesting to note that the distinction between State seizures and Federal seizures, which first appears in *Weeks*, was not argued by either side in that case.

Appellant said nothing on that score, and the United States submitted the case, without argument (232 U. S. at 385), on a 3-page brief of which less than one full page was devoted to argument. That portion began by saying U.S. Br., No. 461, Oct. T. 1913, p. 2), "The question is no longer open." Rarely has a vital constitutional question been more inadequately presented by those whose duty it is to assist the Court.

Accordingly, while we cannot agree with the petitioner Rios that the "silver platter" question is still open (Pet. Br., No. 52, this Term, pp. 39-40), we think that the earlier holdings and expressions of this Court on that question can no longer be deemed authoritative since the date of the decision in *Wolf*, and that, for reasons next to be stated, they offend both against sound policy as well as against sound federalism.

2. When the United States uses illegally obtained evidence, howsoever acquired, it ratifies and adopts the illegality with all of the taint thereunto appertaining.

In 1928, more than thirty years ago, a closely divided Court decided *Olmstead* v. *United States*, 277 U. S. 438; and approved what still stands as the ultimate in lawless enforcement of law, viz., the commission of violations of State law in the course of punishing a violation of Federal law.

So much of *Olmstead* as held that wire-tapping did not constitute an unreasonable search and seizure prohibited by the Fourth Amendment still stands, despite opportunities for reconsideration. *Goldman* v. *United States*, 316 U.S. 129; *On Lee* v. *United States*, 343 U.S. 747. Except in its application to State criminal proceedings, see *Schwartz* v. *Texas*, 344 U.S. 199, the significance of the *Olmstead* holding on that score was minimized by the enactment in 1934, of § 605 of the Communications Act of that year (47 U.S.C. § 605; *infra*, *pp.* 106-107), a provision which on the whole has been broadly interpreted to give

ungrudging scope to its terms and to effectuate its policy. *Nardone* v. *United States*, 302 U.S. 379; *Nardone* v. *United States*, 308 U.S. 338; *Weiss* v. *United States*, 308 U.S. 321; *Benanti* v. *United States*, 355 U.S. 96; cf. *Goldstein* v. *United States*, 316 U.S. 114; *Rathbun* v. *United States*, 355 U.S. 107.

There is, however, another aspect of *Olmstead* which, we submit, should be reconsidered—the violation of State law on the part of the Federal officers that was there involved. We read Mr. Justice Holmes' oft-quoted "dirty business" comment (277 U.S. at 470) to apply, not to wire-tapping as such, but only to the circumstance that the wire-tapping in *Olmstead* involved a violation of State law. He said (*loc. cit. supra*):

> "It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. If it pays its officers for having got evidence by crime I do not see why it may not as well pay them for getting it in the same way, and I can attach no importance to protestations of disapproval if it knowingly accepts and pays and announces that in future it will pay for the fruits. We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part.
>
> "For those who agree with me, no distinction can be taken between the Government as prosecutor and the Government as judge. If the existing code does not permit district attorneys to have a hand in such dirty business it does not permit the judge to allow such iniquities to succeed. See *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385. And if all that I have said so far be accepted it makes no difference that in this case wire tapping is made a crime by the law of the State, not by the law of the United States. It is true that a State cannot make rules of evidence for Courts of the United States, but the State has

authority over the conduct in question, and I hardly think that the United States would appear to greater advantage when paying for an odious crime against State law than when inciting to the disregard of its own."

Very plainly, the foregoing passage was not directed at wire-tapping as such independently of the State law which punished that act. And the same views were set forth in the non-constitutional portion of Mr. Justice Brandeis' dissent in the same case. He said (277 U.S. at 479-485 [footnotes omitted]):

"Independently of the constitutional question, I am of opinion that the judgment should be reversed. By the laws of Washington, wire-tapping is a crime. Pierce's Code, 1921, § 8976(18). To prove its case, the Government was obliged to lay bare the crimes committed by its officers on its behalf. A federal court should not permit such a prosecution to continue. Compare *Harkin* v. *Brundage*, 276 U.S. 36, *id.* 604.

"The situation in the case at bar differs widely from that presented in *Burdeau* v. *McDowell*, 256 U.S. 465. There, only a single lot of papers was involved. They had been obtained by a private detective while acting on behalf of a private party; without the knowledge of any federal official; long before anyone had thought of instituting a federal prosecution. Here, the evidence obtained by crime was obtained at the Government's expense, by its officers, while acting on its behalf; the officers who committed these crimes are the same officers who were charged with the enforcement of the Prohibition Act; the crimes of these officers were committed for the purpose of securing evidence with which to obtain an indictment and to secure a conviction. The evidence so obtained constitutes the warp and woof of the Government's case. The aggregate of the Government evidence occupies 306 pages of the printed record. More than 210 of them are filled by recitals of the details of the wire-tapping and of facts ascertained thereby. There is literally no other evidence of guilt on the part of some of the defendants except that illegally obtained by

these officers. As to nearly all the defendants (except those who admitted guilt), the evidence relied upon to secure a conviction consisted mainly of that which these officers had so obtained by violating the state law.

"As Judge Rudkin said below: 'Here we are concerned with neither eavesdroppers nor thieves. Nor are we concerned with the acts of private individuals. . . . We are concerned only with the acts of federal agents whose powers are limited and controlled by the Constitution of the United States.' The Eighteenth Amendment has not in terms empowered Congress to authorize anyone to violate the criminal laws of a State. And Congress has never purported to do so. Compare *Maryland* v. *Soper*, 270 U. S. 9. The terms of appointment of federal prohibition agents do not purport to confer upon them authorty to violate any criminal law. Their superior officer, the Secretary of the Treasury, has not instructed them to commit crime on behalf of the United States. It may be assumed that the Attorney General of the United States did not give any such instruction.

"When these unlawful acts were committed, they were crimes only of the officers individually. The Government was innocent, in legal contemplation; for no federal official is authorized to commit a crime on its behalf. When the Government, having full knowledge, sought, through the Department of Justice, to avail itself of the fruits of these acts in order to accomplish its own ends, it assumed moral responsibility for the officers' crimes. Compare *The Paquete Habana*, 189 U.S. 453, 465; *O'Reilly deCamara* v. *Brooke*, 209 U.S. 45, 52; *Dodge* v. *United States*, 272 U.S. 530, 532; *Gambino* v. *United States*, 275 U.S. 310. And if this Court should permit the Government, by means of its officers' crimes to effect its purpose of punishing the defendants, there would seem to be present all the elements of a ratification. If so, the Government itself would become a lawbreaker.

"Will this Court, by sustaining the judgment below, sanction such conduct on the part of the Executive? The governing principle has long been settled. It is that a court will not redress a wrong when he who invokes its aid has unclean hands. The maxim of

unclean hands comes from courts of equity. But the principle prevails also in courts of law. Its common application is in civil actions between private parties. Where the Government is the actor, the reasons for applying it are even more persuasive. Where the remedies invoked are those of the criminal law, the reasons are compelling.

"The door of a court is not barred because the plaintiff has committed a crime. The confirmed criminal is as much entitled to redress as his most virtuous fellow citizen; no record of crime, however long, makes one an outlaw. The court's aid is denied only when he who seeks it has violated the law in connection with the very transaction as to which he seeks legal redress. Then aid is denied despite the defendant's wrong. It is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination. The rule is one, not of action, but of inaction. It is sometimes spoken of as a rule of substantive law. But it extends to matters of procedure as well. A defense may be waived. It is waived when not pleaded. But the objection that the plaintiff comes with unclean hands will be taken by the court itself. It will be taken despite the wish to the contrary of all the parties to the litigation. The court protects itself.

"Decency, security and liberty alike demand that Government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face."

We submit that the time has come to reconsider the violation-of-State-law aspect of *Olmstead*. We submit that Mr. Justice Brandeis expounded sound doctrine on that issue. We submit that this Court should now adopt as law the ethical views which he then elucidated.

3. When evidence unlawfully or criminally seized by State officers is used in a Federal prosecution to obtain a Federal conviction, such evidence has in fact been gathered on behalf of the United States, and must therefore be excluded.

Prior to *Wolf* v. *Colorado*, 338 U.S. 25, inquiry as to whether there was Federal participation in a particular search that was illegal under Federal standards frequently presented difficult problems, particularly where the State officers actually making the illegal search were acting in furtherance of the enforcement of Federal law.

A classic instance was *Gambino* v. *United States*, 275 U.S. 310, which arose in New York during the prohibition era, but after the State prohibition law had been repealed. There State officers had made an illegal search, the fruits of which would have been inadmissible in a Federal prosecution under the doctrine of *Byars* v. *United States*, 273 U.S. 28, if there had been Federal participation. In fact, there had been no Federal participation, but inasmuch as the State officers subsequent to the repeal of the State prohibition law had been directed by the Governor of the State to assist in the enforcement of the National Prohibition Act, the Court held that they had been acting on behalf of the United States even though they were not agents of the United States, and accordingly excluded the evidence which they had obtained and then had turned over to Federal officials for Federal prosecution. The Court said (275 U.S. at 316-317):

> "We are of opinion that the admission in evidence of the liquor wrongfully seized violated rights of the defendants guaranteed by the Fourth and Fifth Amendments. The wrongful arrest, search and seizure were made solely on behalf of the United States. The evi-

dence so secured was the foundation for the prosecution and supplied the only evidence of guilt. It is true that the troopers were not shown to have acted under the directions of the federal officials in making the arrest and seizure. But the rights guaranteed by the Fourth and Fifth Amendments may be invaded as effectively by such co-operation, as by the state officers acting under direction of the federal officials. Compare *Silverthorne Co.* v. *United States*, 251 U.S. 385, 392. The prosecution thereupon instituted by the federal authorities was, as conducted, in effect a ratification of the arrest, search and seizure made by the troopers on behalf of the United States. Whether the laws of the state actually imposed upon the troopers the duty of aiding the federal officials in the enforcement of the National Prohibition Act we have no occasion to enquire."

The Court then (275 U.S. at 317-318) proceeded to distinguish "the earlier decisions of this Court in which evidence wrongfully secured by persons other than federal officers has been held admissible in prosecutions for federal crimes."

Since *Wolf*, as has been shown, the basis for such decisions no longer exists. Accordingly, we believe that the rationale of *Gambino*, quoted above, to the effect that "The prosecution thereupon instituted by the federal authorities was, as conducted, in effect a ratification of the arrest, search and seizure made by the [State] troopers on behalf of the United States," applies in every respect to the present case.

That is to say, when the United States, through its agents, took possession of the tape recordings belonging to the present petitioners, and used those recordings to prove the *corpus delicti* of the offense charged in the present Federal indictment, the United States was, inescapably, ratifying the search and seizure originally made by the Oregon officials, and was making that search and seizure its own.

We do not believe that the situation should be different even if the original seizure had been a theft by private individuals rather than an illegal search by State officers under the color of an invalid warrant. Here, too, we submit that the governing principle was stated by Brandeis and Holmes, JJ., dissenting, in *Burdeau* v. *McDowell*, 256 U.S. 465, 476-477:

> "Plaintiff's private papers were stolen. The thief, to further his own ends, delivered them to the law officer of the United States. He, knowing them to have been stolen, retains them for use against the plaintiff. Should the court permit him to do so?
>
> "That the court would restore the papers to plaintiff if they were still in the thief's possession is not questioned. That it has power to control the disposition of these stolen papers, although they have passed into the possession of the law officer, is also not questioned. But it is said that no provision of the Constitution requires their surrender, and that the papers could have been subpoenaed. This may be true. Still I cannot believe that action of a public official is necessarily lawful because it does not violate constitutional prohibitions, and because the same result might have been attained by other and proper means. At the foundation of our civil liberty lies the principle which denies to government officials an exceptional position before the law, and which subjects them to the same rules of conduct that are commands to the citizen. And in the development of our liberty insistence upon procedural regularity has been a large factor. Respect for law will not be advanced by resort, in its enforcement, to means which shock the common man's sense of decency and fair play."

It does not become the United States to step into the shoes of State officers who, as here, have violated both the constitution and law of their own state as well as the Fourteenth Amendment to the Constitution of the United States.

4. When the United States uses in a criminal prosecution evidence that is obtained through an illegal search and seizure by persons other than Federal officers, it is giving enforcement to private or State action so as to transform the search and seizure into Federal action.

But it is not necessary to rely entirely on the ascetic conception of public morality that the late Mr. Justice Brandeis drew from equity, from law, and from generally accepted ethical principles. For since *Olmstead* v. *United States*, 277 U.S. 438, there has been decided not only *Wolf* v. *Colorado*, 338 U.S. 25, with its holding that the Fourteenth Amendment includes the Fourth's prohibition against unreasonable searches and seizures, but also *Shelley* v. *Kraemer*, 334 U.S. 1, which held that a private agreement is transformed into State action when it is given enforcement by State courts. By parity of reasoning, therefore, State action is transformed into Federal action when its fruits are used in furtherance of a prosecution in the Federal courts.

It will be recalled that, for many years, it was not possible to obtain an adjudication as to the constitutionality or otherwise of restrictive racial covenants that by their terms forbade sale of real estate to members of particular racial groups. Cf. *Corrigan* v. *Buckley*, 271 U.S. 323, dismissed for want of jurisdiction because of the absence of a substantial constitutional question.

Later, however, see *Shelley* v. *Kraemer*, 334 U.S. 1, the point was decided otherwise, and the holding was that, when such a covenant—a purely private agreement—is given effect by State courts by way of an injunction preventing its violation, such enforcement constitutes State action, with the result that its validity must be tested by the commands of the Fourteenth Amendment.

This Court said (334 U.S. at 14, 18):

> "That the action of state courts and of judicial officers in their official capacities is to be regarded as

action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court."

* * * * * *

"The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference, includes action of state courts and state judicial officials. Although, in construing the terms of the Fourteenth Amendment, differences have from time to time been expressed as to whether particular types of state action may be said to offend the Amendment's prohibitory provisions, it has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government."

We submit, therefore, that when the United States utilizes the fruits of a seizure by State officers or, for that matter, by private citizens, in order to enforce the Federal criminal law in the Federal courts, such utilization in the course of a criminal prosecution constitutes Federal action, and is accordingly subject to the limitations of the Bill of Rights.

Consider the present case: Without the reels of tape recordings illegally seized by the State officers, the United States would not have had a case against these petitioners. The *corpus delicti*—the intercepted communications—was in those recordings, and nowhere else. No interception in violation of the statute could have been proved had the recordings not been received in evidence. Consequently the use of those recordings, in a Federal prosecution pursuant to which individuals will be fined and imprisoned, constitutes Federal action, regardless of the original source of the recordings or of the means by which they were acquainted. Accordingly, since the taking of the recordings violated petitioners' constitutional rights, those recordings may not be received in evidence in any Federal court.

As was said in *Weeks*, 232 U.S. at 393, if such articles "can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed is concerned, might as well be stricken from the Constitution."

Nor is the situation different if the Fourteenth Amendment be substituted for the Fourth; courts of the United States have a duty to uphold all of the Constitution, not simply selective portions thereof. Indeed, if freedom from improper searches is a part of Due Process under the Fourteenth Amendment, it necessarily constitutes a part of Due Process under the Fifth. *Bolling* v. *Sharpe*, 347 U.S. 497.

Surely there can be no clearer example of Federal action than a Federal criminal prosecution which if successful will deprive these petitioners of their liberty. That being so, the prosecution here in question is subject to the constitutional restriction, and the evidence in question must therefore be excluded. Any other holding would render meaningless the constitutional guarantee against unreasonable searches and seizures which since 1949 has limited not only the United States but also the several States.

5. Federal constitutional interests are frustrated rather than furthered when, as here, evidence (a) inadmissible in a State court because illegally seized, which (b) would have been equally inadmissible in a Federal court if similarly seized by or on behalf of Federal officers, and (c) which if Federal officers had similarily seized they would not have been permitted to transfer to State officers for purposes of State prosecution, should now be (d) held admissible in a Federal court because transferred from State to Federal custody rather than in the other direction.

Any notion that the "silver platter" rule sanctioned and applied by the court below somehow promotes the basic consideraitons of federalism that are reflected in the essential separateness of State and Federal prosecutions (cf.

Feldman v. *United States*, 322 U.S. 487; *Bartkus* v. *Illinois*, 359 U.S. 121; *Abbate* v. *United States*, 359 U.S. 187) is quickly dispelled once the problems presented by the case at bar are analyzed.

Four situations are possible:

(1) Evidence is illegally seized by Federal officers and is sought to be used in a Federal prosecution.

(2) Evidence is illegally seized by Federal officers and is by them sought to be turned over to State officers for use in a State prosecution.

(3) Evidence is illegally seized by State officers and is sought to be used in a State prosecution.

(4) Evidence is illegally seized by State officers and is by them sought to be turned over to Federal officers for use in a Federal prosecution.

Case (1), since *Weeks* is of course perfectly clear: The evidence is inadmissible.

Case (2) is equally clear since *Rea* v. *United States*, 350 U.S. 214: The Federal officers will be enjoined from turning over to State officers the fruits of their illegal activities.

Case (3) is, in Oregon, similarly crystal clear: The evidence is inadmissible.

Case (4) is the present case, and we ask, on what principle of federalism, by what calculus of constitutional values, does the illegally seized evidence become admissible here, simply because the transfer has been from State to Federal officers rather than *vice versa*?

The present record (R. 100-103, 105-106, 117-119, 203-204, 262, 268) convincingly documents the comment made by this Court within the year (*Bartkus* v. *Illinois*, 359 U.S. at 123), to the effect that cooperation between State and Federal authorities "is the conventional practice between the two sets of prosecutors throughout the country." It is thus

plain that to admit the illegally seized evidence in Case (4) alone would not further federalism, but would frustrate it, because it would evade rather than enforce a basic constitutional command whose substance is equally binding upon both Federal and State officers.

Right there lies the essential vice of the "silver platter" doctrine, certainly since *Wolf* was decided: It puts a premium on a particular kind of transfer, and thus, necessarily, encourages subterfuge and evasion—while simultaneously promoting disrespect for law and a concomitant contempt for a freedom that is comprehended within the concept of ordered liberty.

Indeed, having in mind that the present case arose in a State that follows *Weeks* and which bars the use of illegally seized evidence in its own courts, the holding now under review places the Federal Government in the indefensible position of frustrating State policies, not indeed in furtherance of any paramount Federal policy, but in derogation of the Federal policy that is explicitly set forth in the Fourth Amendment and is also comprehended within the Due Process Clause of the Fourteenth.

Instances are legion where the exercise of Federal power and the operation of the Federal Constitution necessarily override State policies. As Mr. Justice Holmes remarked nearly fifty years ago, "one in my place sees how often a local policy prevails with those who are not trained to national views and how often action is taken that embodies what the Commerce Clause was meant to end." *Law and the Court*, in *Speeches* (1913) 98, 102. Other and more recent instances of such conflicts come readily to mind. *Cooper* v. *Aaron*, 358 U.S. 1; *United States* v. *Raines*, No. 64, this Term; *Hannah* v. *Larche* and *Hannah* v. *Slawson*, Nos. 549 and 550, this Term; *United States* v. *Thomas*, No. 667, this Term.

Here, however, the State policy against unreasonable searches and seizures is identical with the Federal policy.

Moreover, if the transfer had been from Federal to State officers, instead of, as here, *vice versa*, then the evidence would have been inadmissible in a State prosecution under the rule of the *Rea* case. Accordingly, we are at a loss to understand what possible Federal policy or what particular doctrine or clause of the Constitution is being furthered by the holding now under review.

If the present case had arisen in a non-*Weeks* jurisdiction it would be somewhat less dramatic since no State policy against the use in State prosecutions of illegally seized evidence would then be frustrated. But the Federal policy of the Fourteenth Amendment would still be impeded by the use of evidence thus obtained. In short, the controlling feature of this and other "silver platter" cases is not whether the evidence illegally seized by State officers can be used in a State court—that is simply a question of *Weeks* or non-*Weeks* in a particular State—the controlling feature is that where evidence is illegally seized, such seizure violates either the Fourth or the Fourteenth Amendment depending on who was responsible therefor, and consequently it should be equally inadmissible when offered in a Federal prosecution. After all, a court of the United States sits to protect and defend the entire Constitution of the United States, not to give effect to and participate in the violation of a particular part of that instrument.

It is also to be noted that in the present instance the substantive offenses are identical. Petitioners were indicted by the State grand jury for violation of the State wire-tapping statute, Ch. 675, Ore. Laws 1955, *infra*, pp. 108-109; see R. 17, 26, 27, 290, 427. Thereafter they were indicted by the Federal grand jury for violation of the Federal wire-tapping statute, 47 U.S.C. §§ 501 and 605, *infra*, pp. 106-107 (R. 4-11).

Passing the point that the Federal act probably occupied the field, cf. *Pennsylvania* v. *Nelson*, 350 U.S. 497, having

regard to the unquestioned holding that intrastate communications fall within the Federal proscription (*Weiss* v. *United States*, 308 U.S. 321), it is thus clear that both sovereignties were striking at substantially identical conduct. Why then, when under three combinations of circumstances successful prosecution would have been impossible because of the lawless manner in which the *corpus delicti* was obtained, should a fourth combination be permitted to succeed, the same illegal seizure being involved?

The answer is that it should not be, as a recapitulation of the four possible situations will show.

(1) If the tape recordings that evidenced the offense of tapping wires had been seized by Federal officers in the same way that those recordings were in fact seized by the State officers, then, without any doubt whatever, a motion to suppress under Criminal Rule 41(e), in a Federal prosecution under 47 U.S.C. § 501 for violating 47 U.S.C. § 605, would and indeed must have been granted under the *Weeks* rule, and the prosecution would fail.

(2) If thereafter the same Federal officers sought to turn over the fruits of their illegal seizure to State officers, as a predicate for a subsequent prosecution in the State courts for violation of the State anti-wire-tapping statute, a Federal court would have prevented the Federal officers from thus evading the Federal Criminal Rules' prohibition against unreasonable searches and seizures. *Rea* v. *United States*, 350 U.S. 214.

(3) In the present case, since the tape recordings that evidenced the offense were illegally seized by State officers, those recordings were successively suppressed by two State courts, and in consequence the State indictment that charged petitioners with violating the State anti-wire-tapping statute was, necessarily, dismissed; no prosecution was thereafter possible.

(4) Consequently here, once the recordings thus illegally seized by the State officers and suppressed by the State

courts were thereafter turned over to Federal officers and used in furtherance of a Federal prosecution for violating 47 U.S.C. § 605, they should also have been suppressed.

No sound theory of law, of social interests, of federalism, or of constitutional interpretation requires that, in this fourth instance alone, the illegally seized tapes should be admissible. To the contrary, the considerations already canvassed imperatively impel the conclusion that the same result must follow as in the other three situations with the consequence that the judgment below, which held the contrary, must be reversed.

6. The present case graphically demonstrates that application of the "silver platter" doctrine results in "a disreputable collision of jurisdictions"

On Mr. Justice Holmes' view that "we need education in the obvious more than investigation of the obscure" (*Law and the Court* (1913), in *Speeches*, 99), it may not be amiss to recur to some fundamentals.

The essence of federalism is that two sovereignties, one national, the other local, both exert power over the same territory. See *Ableman* v. *Booth*, 21 How. 506, 515-516, 523; *Tarble's Case*, 13 Wall. 397, 406-407; *Ponzi* v. *Fessenden*, 258 U.S. 254, 259; *Feldman* v. *United States*, 322 U.S. 487, 490-491. The essence of a healthy and effective federalism requires that conflict between the instrumentalities of two sovereignties be minimized, and that, in particular, collisions between their separate systems of courts be prevented. Absent any conflict between State and Federal law and policy—and here there is none, as the United States and Oregon are as one in their condemnation of the use of illegally seized evidence—absent any such conflict, the problem becomes one "of preventing interference, friction, and conflict between the federal and state courts." Warren, *Federal and State Court Interference*, 43 Harv. L. Rev. 345 (1930).

This case graphically demonstrates that, so long as the "silver platter" doctrine remains law, there is certain to be a maximum of interference between State and Federal courts, particularly in the many States that follow the *Weeks* rule.

First conflict. Notwithstanding the fact that two State courts had suppressed as illegally seized the evidence here in question (R. 21-28), on grounds that conformed to Federal standards (*ibid.*; and see R. 411-414), the United States District Court, on the strength of the "silver platter" doctrine (R. 278-286), nonetheless ordered the same evidence admitted (R. 398-399), and was sustained in its ruling by the Court of Appeals (R. 456).

There is no question here, as there was in *Rios* (No. 32, this Term), of the right of the Federal court to reexamine the State court's determination. Nor is there any question here, as there is in *Rios*, of the Federal court reaching a different conclusion on an independent review of a more complete record of the circumstances of the seizure. To the contrary, the holding of both Federal courts here was that the illegality of the seizure—which under the doctrine of *Wolf* v. *Colorado*, 338 U.S. 25, involved a violation of the Federal Constitution—was immaterial.

Second conflict. After the United States District Court had denied petitioners' motion to suppress, the State Circuit Court enjoined seven named State and County officers from testifying in the United States District Court concerning the circumstances of the seizure (R. 301-304). As the State Circuit Court's opinion shows (R. 295-301), its order was based on the rule of this Court in the converse situation in *Rea* v. *United States*, 350 U.S. 214.

Third conflict. Notwithstanding the State Circuit Court's restraining order, the United States District Court, over petitioners' objection, directed each of the enjoined witnesses to answer, and they did so, *supra*, pp. 19-21).

Fourth conflict. Petitioners moved in the State Circuit Court to cite all of the foregoing witnesses for contempt, viz., for their violation of the terms of the State Circuit Court's order (R. 434-438).

Fifth conflict. The United States Attorney brought suit in the name of the United States to enjoin petitioners from further prosecution of the above-mentioned contempt proceedings, and obtained a restraining order as prayed for (R. 422-448).

Thus the application of the "silver platter" doctrine in this case has resulted in five conflicts, a situation that may well be characterized in this Court's words (*Orton* v. *Smith*, 18 How. 263, 266), as "a disreputable collision of jurisdictions."

Contrariwise, suppose there were no "silver platter" doctrine: As we have said, we do not suggest for a moment that the Federal court would not be free to reexamine *de novo* the alleged illegality of the original State search. Thus in individual instances the Federal court might well reach a determination different from that of the State court on the issue of illegal search and seizure *vel non*. Such a reexamination *de novo* would also assure against frustration of Federal action if evidence essential to such action should for any reason be colorably suppressed.

But, once the Federal court found that the original State seizure was indeed illegal under Federal standards, once a Federal prosecutor admitted, as the United States Attorney here admitted (R. 80), "that for the purposes of this matter"—the Federal motion to suppress—"we may treat it"—the State search—"as illegal," then that ends the inquiry, and then there is no possibility of any further collision between State and Federal courts.

Nor would such an avoidance of conflict involve any surrender of Federal rights—or even any appeasement to opponents of Federal supremacy. Quite to the contrary,

elimination of the "silver platter" doctrine would strengthen the position of the Constitution of the United States, because it would insure that the courts of the United States respect and give effect to the prohibition against unreasonable searches and seizures that is embodied in the Fourteenth Amendment as well as to the same prohibition more specifically formulated in the Fourth. The obligation to support and defend the Constitution of the United States extends to every part of that instrument; there is no room in Federal jurisprudence for a merely selective enforcement of its provisions.

7. Since the "silver platter" doctrine now has neither doctrinal nor practical support, it should be abandoned.

The doctrinal basis of the "silver platter" doctrine, which was simply the undoubted rule that the Fourth Amendment does not apply *eo nomine* to the States (*Weeks* v. *United States*, 232 U.S. 383, 398), has been completely undercut by the later holding of *Wolf* v. *Colorado*, 338 U.S. 25, to the effect that freedom from unreasonable searches and seizures is protected from State action by the Due Process clause of the Fourteenth Amendment.

Consequently every illegal search by State officers necessarily involves a violation of the Federal Constitution, and hence the fruits of such searches should be inadmissible in any Federal prosecution. Surely the result of an illegal search that violates the Fourteenth Amendment cannot have higher standing in a court of the United States than the result of a similar search that has only violated the Fourth.

It follows that since 1949 there has been no further doctrinal support for the "silver platter" rule.

Nor is the ethical or practical case for the "silver platter" rationale any sounder. When the United States uses illegally seized evidence, howsoever acquired, it necessarily ratifies and adopts the illegality, and places itself *in pari*

delicto with the original violator. More than that, such Federal use of illegally seized evidence gives judicial enforcement to State or private action and therefore transforms that action into Federal action—which of course is subject to every limitation of the Federal Constitution.

In practice, the continued vitality of the "silver platter" rule encourages subterfuge and evasion, because, as we have demonstrated above, pp. 64-69, its operation means that, in a *Weeks*-rule State such as Oregon, the only present opportunity for the use of illegally seized evidence is for State officers to conduct an illegal search on their own, and then to turn over the fruits thereof to Federal officers for Federal prosecution. The opportunities thus created for evasion of a basic constitutional command are obvious.

Such evasion is particularly likely in view of the normal methods of cooperation between State and Federal law enforcement agencies that is reflected by the present record (*supra*, pp. 13-14). Not only that, but the seized tapes were in part played to a Federal agent by State officers on May 22, 1956 (*supra*, pp. 8, 14), the very time when the motion to suppress was being heard in the State court (R. 410). Nor is this an isolated instance of "cooperation." For both *Byars* v. *United States*, 273 U.S. 28, and *Lustig* v. *United States*, 338 U.S. 74, were on the line that separates participation from independent action, and in both instances the courts below, which had held that there was no Federal participation in the original seizure, were reversed.

The "silver platter" rule, accordingly, does not advance the cause of federalism—but only that of sneakiness.

Additionally, the "silver platter" rule opens the door wide to continued and consistent conflict between State and Federal courts, conflict which is the more unnecessary since in this case the same policy—freedom from unreasonable searches and seizures—is sought to be enforced by both

sets of courts. The present case dramatically shows that these possibilities of conflict are actual and not imaginary dangers.

Far from vindicating any Federal interest, the application of the "silver platter" rule results in a selective enforcement of the Constitution, preferring the Fourth Amendment over the Fourteenth essentially because of the happenstance of which government employed the officers who effected an illegal search and seizure that offended against the standards of both.

For all of these reasons, we submit that the State seizure aspect of *Weeks* and all later expressions to the same effect "can no longer be guiding" (*Rochester Tel. Corp.* v. *United States*, 307 U.S. 125, 143), that "such vitality, as a precedent, as [the State seizure aspect of *Weeks*] then had has long since been exhausted" (*United States* v. *Darby*, 312 U.S. 100, 117), and that accordingly the "silver platter" rule should "be allowed a deserved repose" (Holmes, J., in *Adkins* v. *Children's Hospital*, 261 U.S. 525, 567, 570).

III. THE RULE OF REA V. UNITED STATES, 350 U.S. 214, THAT A FEDERAL COURT AFTER SUPPRESSING EVIDENCE ILLEGALLY SEIZED SHOULD ENJOIN A FEDERAL OFFICER FROM THEREAFTER TESTIFYING IN A STATE PROSECUTION CONCERNING THE SEIZURE, IS ONE OF COMITY, AND IS APPLICABLE IN PARI MATERIA TO STATE SUPPRESSION OF EVIDENCE FOLLOWED BY A FEDERAL PROSECUTION BASED ON THE SAME EVIDENCE

As we have already said, p. 34, *supra*, a decision overruling the "silver platter" doctrine will result in reversal, and will render unnecessary any consideration of the *Rea* problem.

If, however, the "silver platter" rule should be reaffirmed, then the present point is squarely presented.

We may note by way of preliminary that the offhand and summary manner in which the court below disposed of petitioners' contentions under the present heading—"we

have considered them and find no merit in them" (R. 458) —hardly fulfilled the assurance earlier given by the same tribunal, when it denied petitioners' application for a stay pending the filing of a petition for a writ of prohibition, that "their right of appeal from any judgment of conviction will afford them an adequate opportunity for appellate review of such rights as they may have to an exclusion of this evidence" (R. 306).[4] It is surely not simply preoccupation with a particular doctrine to suggest that the solution of a question as substantial as the scope of *Rea* v. *United States*, 350 U.S. 214, deserved a more articulate response than the court below ultimately gave it.

And we think that the grounds on which the court below at first refused even to consider this point involve such a disregard of both the letter and spirit of the Federal Rules of Criminal Procedure as may well call for clarification by this Court. The details appear in the margin;[4] we proceed to a discussion of the merits of the *Rea* issue.

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[4] As has been shown, *supra* pp. 24-25, petitioners' specification of error challenging the District Court's order to the enjoined witnesses to violate the terms of the State restraining order was plainly and clearly presented. Yet the court below held (R. 458) that it was not required to consider that contention because of asserted noncompliance with C.A. 9 Rule 18 (set forth at note 8, R. 452), in that petitioners' Specification of Error 12 did not "quote the grounds urged at the trial for the objections to such admission and the full substance of the evidence admitted."

Inasmuch as Specification 12 (quoted *supra*, p. 24, note 10) plainly set forth the grounds of petitioners' objection, which went to all of the evidence of the named witnesses on substantive grounds that in no sense involved the rules of evidence (cf. Rule 26, F.R. Crim. P.), literal enforcement of the Ninth Circuit's Rule 18 in those circumstances would have required petitioners to duplicate in their brief some 800 typewritten pages of testimony that were adduced over objections which were clearly expressed and understandingly overruled by the trial judge on numerous occasions.

Such literal enforcement, we submit, would have been improper because in violation of Rule 2, F. R. Crim. P., promulgated by

A. The incidents of a race of diligence are not involved here.

Petitioners' position is that the validity or otherwise of the State restraining order cannot turn on the incidents of chronology — i.e., whether that order preceded or followed the Federal subpoenas—because then there might well be different answers as to different witnesses. See pp. 19-21, *supra*, for the details; these may be summarized here as follows:

(1) All of the eight witnesses in question other than Darby were subpoenaed by petitioners in connection with their motion to suppress. Of the seven remaining, one, Howlett, was excused outright; four others—Minielly, Schrunk, Lonergan, and Cross—were specifically advised that they were still subject to subpoena; while the remaining two, Gurdane and Langley, were somewhat more equivocally told to be subject to call.

We do not think that anything turns on this classification, nor indeed on the precise terms in which the witnesses who were not fully excused were directed to hold themselves available for recall, nor for that matter on the circumstance that only a single such witness—Gurdane—was in fact recalled. For, in our view, all of the subpoenas, which required attendance only at the hearing of the motion to suppress, became *functus* when the trial judge announced his ruling denying the motion to suppress, and thus terminated that proceeding. Once that happened, the subpoenas lapsed of their own terms.

(2) In considering the sequence of events in connection with the restraining order, certain dates must be borne in mind.

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this Court, which specifically directs that the Criminal Rules be construed "to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." And Rule 2, like all of the others, applies to criminal cases in Courts of Appeals by the very specific terms of Criminal Rule 54(a)(1).

a. On March 12, 1957, about five weeks after the indictment was returned, the case was set for trial on March 26, (Docket Entry, March 12; not printed).

b. A motion for a 90-day continuance, filed on March 18, was on March 20 granted only for 21 days, advancing the trial date to April 16 (Docket Entries, March 18 and 20; not printed).

c. Petitioners' motion to suppress was filed on March 25 (R. 13).

d. Testimony on the motion to suppress was taken on April 9, 10, 11, 12 (R. 52; Docket Entries, April 9-12, not printed).

e. The motion to suppress was denied on April 12 (R. 278-286; Docket Entry, April 12, not printed).

Not until then was it possible for petitioners to apply to the State court for an order based on the *Rea* doctrine, in view of the principle, well-established in Oregon since the earliest days (*Wells, Fargo & Co.* v. *Wall*, 1 Ore. 295; *Haines* v. *Hall*, 17 Ore. 165, 20 Pac. 831; *Union Light & Power Co.* v. *Lichty*, 42 Ore. 563, 71 Pac. 1044; *Holmes* v. *Graham*, 159 Ore. 466, 80 P. 2d 870), that equitable relief is available only upon a showing that the legal remedy is inadequate. For, very plainly, the legal remedy of a motion to suppress could be invoked in the first instance, nor was it shown to be inadequate until after it had been denied. Immediately thereafter, on April 13, the State proceeding was commenced (R. 423).

(3) In our view, at least three reasons militate against testing the validity of the State restraining order by considerations of priority, by inquiring whether it preceded or followed the date and/or service of particular Federal subpoenas.

First, in any normal situation, where defendants are not rushed to trial as these petitioners were (and thereafter

subjected to Saturday and evening trial sessions, see p. 18, *supra*), there is a far longer interval between the conclusion of the hearing of a motion to suppress and the commencement of the trial. Consequently, in the normal situation, subpoenas for witnesses to appear at the trial would not—as was the case here—be issued and served while a motion to suppress is still being heard. We submit that, whatever the rule ultimately laid down under the present heading, it should be one that is fashioned for all cases.

Second, at least three of the eight witnesses in question —Howlett, Lonergan, Darby—had not been subpoenaed for the Federal trial until after the State restraining order had been issued, and after it had ripened into a preliminary injunction. Therefore, if priority of time is to be the criterion, one result would follow as to these three witnesses, and another as to the remaining five.

Third, to make the decision turn on questions of priority would set off races of diligence, and thus would encourage conflicts and collisions between State and Federal courts rather than assist in ascertaining the proper boundaries between them.

We submit, therefore, that the validity of the State restraining order does not depend in any degree on whether the persons named therein were or were not under Federal subpoena at the time. If the *Rea* doctrine is one of comity, then the State restraining order was effective against all the enjoined witnesses. If the *Rea* doctrine is not one of comity, then the State restraining order was without effect even as to the State officers who were not yet under a Federal subpoena.

B. The Rea ruling rested, not on the Supremacy Clause, but on the proposition that a Federal court should by an in personam decree prevent Federal officers from flouting Federal policies.

If the ruling in *Rea* v. *United States*, 350 U.S. 214, actually rested on the Supremacy Clause of the Constitution, then it might well be argued that although, as there, a Federal court could restrain a Federal officer from testifying in a State court concerning the fruits of an illegal Federal search and seizure, a State court could not similarly restrain a State officer from testifying in a Federal court concerning the fruits of an illegal State search and seizure; and, indeed, the Federal trial judge here directed the enjoined witnesses to testify on the footing that, by reason of the Supremacy Clause, the State restraining order was a nullity (R. 310, 312, 322, 370, 385).

That ruling, we submit, reflects a misreading of the *Rea* case.

There evidence which had been illegally seized by Federal officers under an invalid search warrant was ordered suppressed by a United States District Court pursuant to Rule 41(e), F. R. Crim. P. (*infra*, p. 111). The evidence in question was marihuana, a narcotic drug, which after seizure (28 U.S.C. § 2463) "shall be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof." Thereafter the suppressed evidence was turned over to the State authorities, and Rea was charged in a State court on the basis of that same evidence. This Court held, reversing the courts below, that Rea was entitled to an order enjoining the Federal agent who had seized the marihuana from transferring it to the State authorities, and from testifying with respect thereto in the State courts.

Nothing was said or even intimated by this Court about the Supremacy Clause. The gist of the decision appears in the following (350 U.S. at 217-218):

> "A federal agent has violated the federal Rules governing searches and seizures—Rules prescribed by this Court and made effective after submission to the Congress. See 327 U.S. 821 *et seq.* The power of the federal courts extends to policing those requirements and making certain that they are observed. As stated in *Wise* v. *Henkel*, 220 U.S. 556, 558, which involved an order directing the district attorney to return certain books and papers unlawfully seized:
>
> > "'. . . it was within the power of the court to take jurisdiction of the subject of the return and pass upon it as the result of its inherent authority to consider and decide questions arising before it concerning an alleged unreasonable exertion of authority in connection with the execution of the process of the court.'
>
> "No injunction is sought against a state official. The only remedy asked is against a federal agent who, we are told, plans to use his illegal search and seizure as the basis of testimony in the state court. To enjoin the federal agent from testifying is merely to enforce the federal Rules against those owing obedience to them.
>
> "The command of the federal Rules is in no way affected by anything that happens in a state court. They are designed as standards for federal agents. The fact that their violation may be condoned by state practice has no relevancy to our problem. Federal courts sit to enforce federal law; and federal law extends to the process issuing from those courts. The obligation of the federal agent is to obey the Rules. They are drawn for innocent and guilty alike. They prescribe standards for law enforcement. They are designed to protect the privacy of the citizen, unless the strict standards set for searches and seizures are satisfied. That policy is defeated if the federal agent can flout them and use the fruits of his unlawful act either in federal or state proceedings."

C. The present case is in every significant respect, the precise converse of Rea.

This case is the precise converse of *Rea*: Evidence was suppressed by State courts because seized under an invalid search warrant. Petitioners were thereafter indicted in the Federal court on the basis of the identical suppressed evidence. They then obtained an order from the State court forbidding the State and County officials who had been concerned in the illegal seizure from testifying in respect thereto in the Federal court or elsewhere. (We add, parenthetically, that the County officials stand on the same footing as the State officials, inasmuch as, under Oregon law, Counties are not independent governmental units, but are merely territorial subdivisions and political agents of the State. See *State ex rel.* v. *Malheur County Court*, 185 Ore. 292, 203 P. 2d 305; *Mackenzie* v. *Douglas County*, 81 Ore. 442, 159 Pac. 625, 1033; *Yamhill County* v. *Foster*, 53 Ore. 124, 99 Pac. 286.)

Finally, the property illegally seized, which in *Rea* was subject to Federal court order by statute, 28 U.S.C. § 2463, was in this case subject to State court order by the terms of the orders suppressing it (R. 24, 27, 28).

Thus the two cases are, in every material particular, indistinguishable.

The State order was specifically rested on *Rea* by the judge who issued it in order to prevent an abuse of State process (R. 295-304); why then should it not be accorded like effect?

The alleged distinctions asserted by the Government (U.S. Memo. 8-9) do not add up to a difference of substance.

It is said (U.S. Memo 8) that in *Rea* the State prosecution was initiated by the Federal agent who had made the unlawful search and seizure, while here it was initiated, not by the offending State officers, but by Federal officers. But this argument completely overlooks the circumstance that

the offending State officers here, five days after the seizure, made the fruits thereof available to F.B.I. Agent Sherk and played one of the seized tapes for him (*supra*, p. 8), and that Sherk's subsequent taking of the five tapes was under a Federal search warrant which was predicated on what he learned on that occasion (R. 1).

It is also said (U.S. Memo. 8-9), that the State officers here were under Federal subpoena, while in *Rea* "it was not shown that the federal officer had been served with state process." But three of the State officers here, as has been shown (*supra*, pp. 19-21), were not under any Federal subpoena at the time of the State restraining order.

But there is a more fundamental reason why the distinctions put forward by the Government are unavailing, viz., that those factors were no part of the rationale of *Rea*.

We repeat here the passage from *Rea*, 350 U.S. at 217-218, already quoted above, page 80, with "state" substituted for "federal" and *vice versa* wherever those two words appear in the original, and with "constitutional provisions" similarly substituted for "Rules." That passage would then read as follows (substituted words are italicized):

> "A *state* agent has violated the *state constitutional provisions* governing searches and seizures • • •. The power of the *state* courts extends to policing those requirements and making certain that they are observed. As stated in *Wise* v. *Henkel*, 220 U.S. 556, 558, which involved an order directing the district attorney to return certain books and papers unlawfully seized:
>
> > "'. . . it was within the power of the court to take jurisdiction of the subject of the return and pass upon it as the result of its inherent authority to consider and decide questions arising before it concerning an alleged unreasonable exertion of

authority in connection with the execution of the process of the court.'

"No injunction is sought against a *federal* official. The only remedy asked is against a *state* agent who, we are told, plans to use his illegal search and seizure as the basis of testimony in the *federal* court. To enjoin the *state* agent from testifying is merely to enforce the *state constitutional provisions* against those owing obedience to them.

"The command of the *state constitutional provisions* is in no way affected by anything that happens in a *federal* court. They are designed as standards for *state* agents. The fact that their violation may be condoned by *federal* practice has no relevancy to our problem. *State* courts sit to enforce *state* law; and *state* law extends to the process issuing from those courts. The obligation of the *state* agent is to obey the *state constitutional provisions*. They are drawn for innocent and guilty alike. They prescribe standards for law enforcement. They are designed to protect the privacy of the citizen, unless the strict standards set for searches and seizures are satisfied. That policy is defeated if the *state* agent can flout them and use the fruits of his unlawful act either in *state* or *federal* proceedings."

Obviously, then, the State Circuit Court in the present case was fully and thoroughly justified in relying on *Rea* in restraining the State and County officials from using the fruits of their unlawful acts in the subsequent Federal proceedings.

D. The Rea rule is one of comity, and to read it as one of supremacy would nullify rather than effectuate basic constitutional provisions.

The District Court's reliance (R. 310, 312, 322, 370, 385) on the Supremacy Clause was misplaced, essentially for the reason that this clause comes into play only where there is conflict between State and Federal law and policy. E.g., *Testa* v. *Katt*, 330 U.S. 386; *Ableman* v. *Booth*, 21

How. 506. But, where there is no conflict between Federal and State law and policy, the Supremacy Clause in no sense requires automatic precedence for the proceedings of Federal courts in every instance. See Warren, *Federal and State Court Interference*, 43 Harv. L. Rev. 345 (1930).

Here there is no conflict between the policies of the two sovereignties. The United States and the State of Oregon both prohibit, in their respective Constitutions, unreasonable searches and seizures. U. S. Const., IV Amendment; Oregon Const., Art. I, Sec. 9; both *infra*, pp. 105-106. The United States and the State of Oregon both prohibit, in their respective criminal prosecutions, the use of evidence unlawfully seized in violation of these constitutional provisions. *Weeks* v. *United States*, 232 U.S. 383; *State* v. *Laundy*, 103 Ore. 443, 494, 204 Pac. 958, 974-975, 206 Pac. 290; *State* v. *McDaniel*, 115 Ore. 187, 199-209, 231 Pac. 965, 969-972, 237 Pac. 373; cf. *State* v. *Hoover*, — Ore. —, 347 P. 2d 69 (Nov. 25, 1959). Moreover, the Fourteenth Amendment as interpreted in *Wolf* v. *Colorado*, 338 U.S. 25, would prevent the State of Oregon from authorizing unreasonable searches and seizures. And, as has been pointed out at some length above, pp. 34-41, there is no question here either of differing State and Federal standards for determining the unreasonableness or otherwise of particular searches and seizures; or of the right of a Federal court to make an independent reexamination of the identical issue, whether on the same or on a different record.

There being no conflict, the Supremacy Clause does not come into question, and the problem is accordingly not one of supremacy but of comity. In the words of Chief Justice Taft, speaking for this Court in *Ponzi* v. *Fessenden*, 258 U.S. 254, 259, 260:

> "We live in the jurisdiction of two sovereignties, each having its own system of courts to declare and enforce its laws in common territory. It would be

impossible for such courts to fulfil their respective functions without embarrassing conflict unless rules were adopted by them to avoid it. The people for whose benefit these two systems are maintained are deeply interested that each system shall be effective and unhindered in its vindication of its laws. The situation requires, therefore, not only definite rules fixing the powers of the courts in cases of jurisdiction over the same persons and things in actual litigation, but also a spirit of reciprocal comity and mutual assistance to promote due and orderly procedure.

* * * * *

"The chief rule which preserves our two systems of courts from actual conflict of jurisdiction is that the court which first takes the subject-matter of the litigation into its control, whether this be person or property, must be permitted to exhaust its remedy to attain which it assumed control, before the other court shall attempt to take it for its purpose."

Thus, just as a State court cannot assume jurisdiction over property in the custody of a Federal court (e.g., *Freeman* v. *Howe*, 24 How. 450), so, reciprocally, a Federal court may not seize property held under the order of a State court. E.g., *Fischer* v. *American Ins. Co.*, 314 U.S. 549; *Lion Bonding Co.* v. *Karatz*, 262 U.S. 77.

That well-established rule was, plainly enough, violated here; because, when the United States Commissioner, who is an arm of the court (see 28 U.S.C. § 631; 18 U.S.C. § 3041; *Todd* v. *United States*, 158 U.S. 278), issued the Federal search warrant (R. 2-3) pursuant to which the five reels of tape recordings used to convict these petitioners were taken into Federal custody, those reels were then in the custody of the State courts (R. 24, 27, 28). *Ponzi* v. *Fessenden*, *supra*, 258 U.S. at 259, teaches that, even in criminal cases, the doctrine of comity requires that "each system shall be effective and unhindered in its vindication of its laws."

Considerations of comity similarly underlie the statute that since 1793 has denied Federal courts the right to stay proceedings in State courts. Section 5 of the Act of March 2, 1793, c. 22, 1 Stat. 334, now 28 U.S.C. § 2283; see *Toucey* v. *New York L. I. Co.*, 314 U.S. 118. True, a Federal court may, notwithstanding that statute, issue a stay to protect Federal property. *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220. But here there was never the slightest suggestion that the seized articles belonged to the United States. Indeed, petitioners asserted a proprietary interest therein at all times (R. 13, 182; see quotation at p. 15, *supra*).

Yet neither the terms of 28 U.S.C. § 2283 or of its statutory predecessors, nor the underlying policy of those provisions, precluded this Court in *Rea* v. *United States*, 350 U.S. 214, from holding that the Federal agent there should have been enjoined from transferring property to State officials and from testifying in a State court concerning it.

The order considered in *Rea* did not operate as a stay, nor did it attempt to reach property in State custody; it involved simply an *in personam* restraint by a court of the United States on an officer of the United States. So here; the State restraining order (R. 301-304) was patterned after *Rea*, and was directed against State and County officials to redress in effective fashion a twice adjudicated violation of the State constitution, and to prevent any further abuse of State court process. In no sense was the State restraining order, thus directed at State officials, what the Government now appears to call it (U.S. Memo. 9), an effort "to interfere with a federal prosecution."

The difference between the two is clear, and was pointed out by this Court more than half a century ago. See *Ex parte Young*, 209 U.S. 123, 163:

"It is proper to add that the right to enjoin an individual, even though a state official, from commencing suits under circumstances already stated, does not include the power to restrain a court from acting in any case brought before it, either of a civil or criminal nature, nor does it include power to prevent any investigation or action by a grand jury. The latter body is part of the machinery of a criminal court, and an injunction against a state court would be a violation of the whole scheme of our government. If an injunction against an individual is disobeyed, and he commences proceedings before a grand jury or in a court, such disobedience is personal only, and the court or jury can proceed without incurring any penalty on that account.

"The difference between the power to enjoin an individual from doing certain things, and the power to enjoin courts from proceeding in their own way to exercise jurisdiction, is plain, and no power to do the latter exists because of a power to do the former."

The State restraining order here did not undertake to deal with property in Federal custody, nor did it, as in *Riggs* v. *Johnson County*, 6 Wall. 166, and *Amy* v. *The Supervisors*, 11 Wall. 136, attempt to enjoin State officials from complying with prior lawful orders of a Federal court.

In those cases, a Federal court had, by mandamus, directed State officials—County supervisors—to levy a tax to pay the plaintiffs' judgments, and a State court had then enjoined the same officials from levying such a tax. Naturally the State injunction was held invalid in each instance.

If, in the present case, the State restraining order had directed the State and County officials here involved not to comply with the Federal subpoenas at all, we would have a *Riggs-Amy* situation. But here the State restraining order commanded no such action. It left the enjoined officials perfectly free to comply with their several subpoenas, but restricted them only as to particular

testimony, a restriction which was necessary to enforce the State's search-and-seizure policy. The State restraining order was no more an interference with the Federal subpoena than, say, the State's policy as to the attorney-client privilege—and that, assuredly, would justify a member of the State bar, subpoenaed to appear before the Federal court (of whose bar he was not a member), to refuse to testify concerning communications made to him by his clients.

It may be asked, what of *Feldman* v. *United States*, 322 U.S. 487? Passing the point that no State order was there involved, we think that a more telling distinction is that, under an unbroken line of decisions, the privilege against self-incrimination has never been held to be a part of the Due Process of Law that is guaranteed by the Fourteenth Amendment. *Twining* v. *New Jersey*, 211 U.S. 78; *Adamson* v. *California*, 332 U.S. 46. Compare *Ullmann* v. *United States*, 350 U.S. 422; *Adams* v. *Maryland*, 347 U.S. 179.

In the present case, the State restraining order actually enforced two basic and fundamental Federal policies.

The first of these is embodied in the Due Process Clause of the Fourteenth Amendment, which prohibits unreasonable searches and seizures by a State.

The second is the policy of the Fourth Amendment, with its more specific condemnation of unreasonable searches and seizures, and its implementation through the doctrine that forbids the introduction in evidence of articles unlawfully obtained in violation of its substantive provisions.

In respect of the latter aspect, the Federal courts have blazed the trail, ever since *Weeks* v. *United States*, 232 U.S. 383. At that time, see *Wolf* v. *Colorado*, 338 U.S. 25, 29, 33-38, only a single State, Iowa, excluded illegally seized evidence. *State* v. *Sheridan*, 121 Iowa 164, 96 N.W. 730.

Thirty-five years later, when *Wolf* v. *Colorado* was decided, there were said to be 17 States that applied the *Weeks* doctrine of excluding illegally seized evidence. See 338 U.S. at 29, 38.

A more recent compilation, made in 1956 (50 A. L. R. 2d 531, 536) listed 21 States, together with Alaska and Hawaii, in the *Weeks* column, either by statute or decision. Since then Rhode Island has adopted the *Weeks* rule by legislation (R. I. Pub. Laws 1955, c. 3590; see *State* v. *Hillman*, 84 R. I. 396, 125 A. 2d 94), with the result that 24 States now apply the *Weeks* doctrine.

Oregon has been in the *Weeks* column for some time. See *State* v. *Laundy*, 103 Ore. 443, 494, 204 Pac. 958, 974-975, 206 Pac. 290; *State* v. *McDaniel*, 115 Ore. 187, 199-209, 231 Pac. 965, 972, 237 Pac. 373; cf. *State* v. *Hoover*, — Ore. —, 347 P. 2d 69 (Nov. 25, 1959). As the successive Oregon rulings that suppressed the evidence illegally taken from these petitioners show (R. 21-25, 25-28, 411-414), Oregon gives to the search and seizure provision of the Oregon Constitution (Art. I, Sec. 9; *infra*, p. 105) the same sanction and implementation that *Weeks* gave to the Fourth Amendment to the Constitution.

Thus the Oregon law and policy that both Federal courts below brushed aside were consistent with and in furtherance of Federal law and policy—as the earlier Oregon law and policy (see *State* v. *Ware*, 79 Ore. 367, 373, 154 Pac. 905, 907) were not.[5]

Therefore, unless the Supremacy Clause is now to be used, not to establish the national paramountcy of the Con-

[5] *State* v. *Folkes*, 174 Ore. 568, 588-589, 150 P. 2d 17, 25, certiorari denied, 323 U.S. 779, rejected the Federal rule of *McNabb* v. *United States*, 318 U.S. 332, with respect to a confession. We do not read that decision as repudiating the *Weeks* rule, and the present record convincingly shows that the lower Oregon courts do not so read it either.

stitution, but rather to excise therefrom the substantive protections and prohibitions of the Fourth Amendment as well as a significant application of the Due Process Clause of the Fourteenth Amendment, the rulings below, which refused to give effect to the State restraining order and which rejected the view that *Rea* laid down a doctrine of comity, cannot be supported on the Supremacy Clause ground on which they were rested (R. 305-306, 310, 312, 322, 370, 385).

We submit that those rulings, which under the guise of asserting Federal supremacy actually nullified two vital constitutional provisions, the Fourth Amendment and part of the Fourteenth, involve not only a misreading but indeed a perversion of the Supremacy Clause.

E. Since Oregon excludes illegally seized evidence while New Mexico admits it, the present case is even stronger than Rea for an injunction against testifying and using the suppressed evidence in a second prosecution by a different sovereign.

We have argued above, pp. 81-83, that this case is the exact converse of *Rea*. Actually, however, it is stronger, and for this reason:

In New Mexico, where *Rea* arose, the State courts reject the *Weeks* rule, and admit evidence even though it may have been illegally seized. *State* v. *Dillon*, 34 N.M. 366, 281 Pac. 474; cf. *Breithaupt* v. *Abram*, 58 N.M. 385, 271 P. 2d 827. Since such use by a State of illegally seized evidence does not involve a violation of the Fourteenth Amendment (*Wolf* v. *Colorado*, 338 U.S. 25), Rea's prosecution by the State of New Mexico would, but for the Federal injunction, have been successful. Thus the order which this Court held should have been made had the effect of frustrating a State prosecution, and to that extent nullified a State policy at odds with the Federal policy expressed in the Federal Rules of Criminal Procedure.

Here, on the other hand, the State in which the case arose excludes illegally seized evidence. Therefore these petitioners' prosecution by the State was barred by State law, as indeed the State officials concerned well recognized (R. 225-226). Thus the State restraining order had the effect of furthering not only State policy, but also of furthering the Federal policy that is expressed in the Fourth and Fourteenth Amendments and in the *Weeks* rule.

Consequently, while the *Rea* order ran counter to State policy, the State restraining order here had it been recognized as valid, would have effectuated both State and Federal policies. Accordingly we assert with confidence that this present case is even stronger than *Rea* was for giving substance and content to the fundamental policy against unreasonable searches and seizures.

IV. INASMUCH AS THE DISTRICT COURT RULED THAT THE VALIDITY OF THE FEDERAL SEARCH WARRANT WAS IMMATERIAL AND ACCORDINGLY PREVENTED PETITIONERS FROM ADDUCING EVIDENCE TO ESTABLISH ITS INVALIDITY, THE COURT OF APPEALS WAS NOT THEREAFTER FREE TO AFFIRM THAT WARRANT'S VALIDITY ON THE PRESENT RECORD, NOR WERE THE COURT OF APPEALS' UNDERLYING PREMISES SOUND IN ANY EVENT

If—but only if—all of petitioners' contentions going to the invalidity of the original State search and seizure are rejected, then their convictions can only be sustained on the footing of the validity of the later Federal search and seizure, which was effected pursuant to a Federal search warrant duly issued (R. 2-3). Yet the conclusion of the court below, which indeed so held (R. 456), rests on an indispensable prerequisite to such validity—an affidavit sufficient to establish probable cause—which petitioners were not permitted to challenge. Accordingly, out of an abundance of caution, we have included the present point (Question 4, *supra* p. 3), which invokes the doctrine of *Grunewald* v. *United States*, 353 U.S. 391, to the effect that

an appellate court cannot sustain a conviction on appeal on the basis of facts that were not submitted to the trier of facts below.

A. The holding below that the Federal search warrant was sufficient on the present record violates the rule that an appellate court may not sustain a ruling on appeal on a factual basis that was left undetermined by the trier of facts.

Rule 41(c), F.R. Crim. P. (*infra*, p. 110) prescribes that a search warrant shall issue only on an affidavit "establishing the grounds" for its issuance, and only after the judge or commissioner "is satisfied that grounds for the application exist or that there is probable cause to believe that they exist." Similarly, Criminal Rule 41(e) (*infra*, p. 111) provides that a motion to suppress may be based on the ground that "(4) there was not probable cause for believing the existence of the grounds on which the warrant was issued."

Both provisions on their face implement the command of the Fourth Amendment that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation." Consequently a Federal search warrant issued upon an affidavit that does not establish probable cause is, necessarily, invalid. *Nathanson* v. *United States*, 290 U.S. 41; *Sgro* v. *United States*, 287 U.S. 206; *Byars* v. *United States*, 273 U.S. 28, 29. Indeed, it is a criminal offense to procure a search warrant to be issued "maliciously and without probable cause," 18 U.S.C. § 2235 (*infra*, p. 106).

In the present case, petitioners' motion to suppress alleged, as its second ground, the invalidity of the Federal search warrant because of lack of probable cause in the underlying affidavit; it read as follows (R. 14):

> "b) That the search warrant used by said agent or agents of the Federal Bureau of Investigation on September 5, 1956, in seizing said property is and was invalid, illegal and void in that it is and was

based upon an insufficient affidavit of one Ronald E. Sherk, an F.B.I. agent, and hence said affidavit was illegal, invalid and void, and there was not, therefore, probable cause for the issuance of said warrant;"

At the hearing on the motion to suppress, it was shown that, when Agent Sherk executed the affidavit (R. 1) on which the Federal search warrant (R. 2) was based,

(a) He had never heard four of the five tapes (R. 123-124, 127, 129, 132-133, 142-143, 147-148, 152, 191, 193-194);

(b) He had never heard the three spools of wire (R. 123, 153, 154, 190);

(c) He had no personal knowledge of the manner of interception (R. 150, 193-195);

(d) He had no knowledge of lack of consent by the participants to the conversations on four of the tapes (R. 157-158, 190-191; cf. R. 129-130);

(e) He had no knowledge that the tapes were designed or intended for a use which would violate 47 U.S.C. §§ 501 and 605 (R. 150-152, 191);

(f) Some three and a half months had elapsed between his hearing of a portion of one tape on May 22 and the execution of his affidavit on September 5 (R. 1, 122-126); and

(g) More than three weeks had elapsed between his visual inspection of tapes at the bank on August 13 and the execution of his affidavit on September 5 (R. 174-178).

The ruling of the trial judge, however, was that the validity of the Federal search warrant was immaterial, and accordingly he cut off further inquiry by petitioners' counsel on the issue of Sherk's knowledge or lack of knowledge (R. 200-201, 278-279; quoted *supra*, pp. 14-15, 16). The trial judge specifically told counsel (R. 201) that

his ruling "would prevent you from further inquiring as to the basis of knowledge—the basis for Mr. Sherk's knowledge or lack of knowledge in executing the affidavit for the search warrant. This Court doesn't care from here on out whether he ever executed an affidavit for a search warrant."

Yet the Ninth Circuit held (R. 456) that

> "The record shows that the Federal search and seizure—the search and seizure made on September 5, 1956—were made under, pursuant to and in conformity with 18 U.S.C.A. §§3102-3108 and Rule 41 of the Federal Rules of Criminal Procedure, 18 U.S.C.A."

That is to say, the ruling below sustaining the validity of the Federal search warrant necessarily finds as a fact the very issue of probable cause that petitioners were not permitted to challenge.

We submit that the rule of *Grunewald* v. *United States*, 353 U.S. 391, precludes any such result.

There a conviction was reversed because, although the indictment was sufficient to cover submission of a particular theory of continuing conspiracy, that theory was not submitted to the jury, and accordingly "the convictions * * * might have rested on an impermissible ground." 353 U.S. at 415.

Here, however, there is presented an *a fortiori* situation, since the court below sustained the validity of the Federal search warrant on a factual ground that petitioners were prevented from exploring at the hearing on the motion to suppress (R. 200-201, 278-279).

It follows, we submit, that the court below violated the *Grunewald* rule when it sustained the Federal search and seizure on a conclusory assertion (R. 456, quoted just above) which assumed the very issue that the trier of facts advisedly refused to consider.

The Government's argument in this Court (U.S. Memo. 9-10)—"Having pressed the issue as to the validity of the warrant in the Court of Appeals, the petitioners are in a poor position to put that court into error for considering it"—completely misapprehends the nature of our contentions.

Petitioners did argue in the Ninth Circuit that the Federal search warrant was invalid for several reasons, first "by virtue of the insufficiency of the affidavit of F.B.I. agent Sherk and the demonstrated insufficiency of his knowledge." Appellants' Brief, No. 15378, C.A. 9, pp. 51, 52-54.

In the face of that argument, the court below had several courses open on the record before it:

(a) It might have followed the trial judge, and held that, in view of the "silver platter" doctrine, the validity or otherwise of the Federal search warrant was immaterial.

(b) It might have ruled, as it did, that the validity of the Federal search warrant *was* material. On that footing—

(i) It might have held, on the basis of the evidence already adduced regarding the state of Sherk's knowledge (*supra*, p. 93), that petitioners had sufficiently established that this affiant lacked probable cause.

(ii) It might have held, in view of the ruling below cutting off further inquiry, that the case must be remanded with directions to pursue the inquiry further, and to develop all of the facts bearing on what Sherk actually knew when he executed the affidavit on which the Federal search warrant was issued.

But, after petitioners had been prevented from making their record on that issue, the Court of Appeals could not thereafter properly make a finding adverse to them on that precise point. An appellate court may not, as we read *Grunewald*, sustain a conviction on a ground not passed upon by the trier of facts.

That basic issue, it seems fair to note, needs to be reaffirmed. The court below disregarded it here, although, only a few months earlier, it had recognized and given effect to the *Grunewald* doctrine by remanding a reversed conviction. See *Forman* v. *United States*, 261 F. 2d 181 (decided October 27, 1958).[6] And, in another case now pending here (*Schaffer* v. *United States*, No. 111, this Term; see also *Karp* v. *United States*, No. 122, this Term), the *Grunewald* doctrine was and is strongly put forward in the Petition for Certiorari as a ground for reversing the Second Circuit's decision, reported at 266 F. 2d 435. In view of the circumstance that the Government's only answer in that case to the *Grunewald* argument was silence (see Petrs. Reply Memo., No. 111, pp. 3-4, "*Second*"), after which certiorari was granted (361 U.S. 809), it seems reasonable to infer that the present petitioners are not alone in thinking that the rule of *Grunewald* v. *United States*, 353 U.S. 391, continues to have vitality, and that its role in appellate review still needs to be emphasized.

B. The court below was plainly wrong in holding that petitioners' motion to suppress was not based on any of the grounds specified in Criminal Rule 41(e).

In the course of its opinion, the court below said (R. 457):

> "As indicated above, the motion of March 25, 1957, did not seek return of the property mentioned therein, but merely sought suppression of the property as evidence against defendants; nor was the motion based

[6] The original opinion reversed with directions to enter judgment for the appellants. 259 F. 2d 128. On the Government's petition for rehearing, and on the authority of the *Grunewald* case, a new trial was ordered; in the opinion cited in the text above. Thereafter a new petition for rehearing, filed by the appellants, was denied (264 F. 2d 955), and the case is now here on certiorari (359 U.S. 982), and is awaiting decision following argument on November 19, 1959 (No. 43, this Term).

on any of the five grounds specified in subdivision (e) of Rule 41."

We are frankly at a loss to understand the basis for the last portion of the quoted passage.

Criminal Rule 41(e), *infra* p. 111, enumerates five grounds for a motion to suppress, of which the last two named are—

"(4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or

"(5) the warrant was illegally executed."

The second ground set forth in the motion (¶ b, R. 14) was that Sherk's affidavit was insufficient for want of probable cause. We do not know how ground (4) of Criminal Rule 41(e) could have been more clearly invoked.

The other four grounds set forth in the motion were—

¶(a), R. 14—invalidity of the original State seizure.

¶(c), R. 14—attacked the "silver platter" doctrine.

¶(d), R. 14-15—original State seizure was made only for purposes of Federal prosecution.

¶(e), R. 15—seized property was in State custody, and hence no Federal jurisdiction to seize it.

We submit that these additional grounds clearly fall within Criminal Rule 41(e)(5), illegal execution of warrant, without the slightest rewriting or expansion of that provision.

Accordingly we repeat, we do not understand on what footing the court below could possibly have stated (R. 457) that petitioners' motion to suppress was not based on any of the grounds specified in Rule 41(e).

C. The court below was plainly wrong in holding that petitioners had no standing to file the motion to suppress.

Further in the course of its opinion (R. 457), the court below said that "defendants were not persons aggrieved by the Federal search and seizure and had no standing to challenge the lawfulness thereof or to move the District Court to suppress the property seized." This was based on two grounds (R. 457), first that there was no allegation that the Federal search and seizure were made at any place owned or occupied by the defendants, but only at the First State Bank of Milwaukie, and second that neither defendant had any proprietary interest in the property.

Extended argument is not necessary to establish the complete lack of foundation for both reasons assigned.

1. The court below said (R. 457):

> "The motion did not say, nor does the record show, that the Federal search and seizure were made at any house or place owned, occupied or used by defendants or either of them. Instead, the record shows that the Federal search and seizure were made at the First State Bank of Milwaukie, Oregon."

Now, very plainly, the record shows that the property in question was taken from the home of petitioner Clark, and that, after it was ordered suppressed, it was placed in a safe deposit box in the Milwaukie Bank rented by the Oregon State Police, and held subject to the order of the Oregon courts (*supra*, pages 7-8, 9). That being so, the petitioner Clark's rights to have it suppressed were not diminished by reason of the subsequent transfers of possession. We should have thought that the lack of success for subterfuge in cases of this sort had been sufficiently exposed by *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, *Nardone* v. *United States*, 308 U.S. 338, and *Benanti* v. *United States*, 355 U.S. 96, and that it would now be recognized that such relaying of illegally seized

property could not be availed of by Federal prosecutors to alter the original owner's legal position to his detriment.

Nor is it material that the place from which the property was originally taken was Clark's home and not Elkins' as well. On that aspect of the case, *McDonald* v. *United States*, 335 U.S. 451, is square authority in petitioner Elkins' favor.

There property was illegally seized from the home of one McDonald, where Washington was present, after which it was used in evidence against both. The Government argued (U.S. Br., No. 36, Oct. T. 1948, pp. 14-15) that "Petitioner Washington, who had no interest in the premises searched or the property taken, has no standing to have the seized evidence suppressed as to him." But this Court rejected that argument; it said (335 U.S. at 456):

> "It follows from what we have said that McDonald's motion for suppression of the evidence and the return of the property to him should have been granted. *Weeks* v. *United States, supra; Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 358. It was, however, denied and the unlawfully seized evidence was used not only against McDonald but against Washington as well, the two being tried jointly. Apart from this evidence there seems to have been little or none against Washington. Even though we assume, without deciding, that Washington, who was a guest of McDonald, had no right of privacy that was broken when the officers searched McDonald's room without a warrant, we think that the denial of McDonald's motion was error that was prejudicial to Washington as well. In this case, unlike *Agnello* v. *United States, supra,* [269 U.S. at] p. 35, the unlawfully seized materials were the basis of evidence used against the codefendant. If the property had been returned to McDonald, it would not have been available for use at the trial. We can only speculate as to whether other evidence which might have been used against Washington would have been equally probative."

2. The court below further said (R. 457):

> "The motion did not say, nor does the record show, that, at the time of the Federal search and seizure—September 5, 1956—defendants or either of them owned or had any proprietary interest in the property seized,[18] or that the property was at that time in the custody or possession of defendants or either of them. Instead, the record shows that the property was not in the custody or possession of defendants or either of them at any time after May 17, 1956."

Now, very plainly, the motion (R. 13) was for an "Order directing that *certain property of which defendants herein are the owners*" be suppressed. [Our italics.]

Moreover, at the hearing on the motion, petitioners' proprietary interest in the seized property was reaffirmed (R. 182, quoted above at p. 15).

We do not understand how petitioners' claim of proprietary interest could have been more clearly expressed. Nor, for reasons just set forth, pp. 98-99, *supra*, do we understand how an illegal taking of property from a person's custody and its transfer to a third party deprives the owner of his right to protest the taking. Next, we cannot understand how, *non constat* the court's footnote 18, quoted below, a claim in March 1957 of present ownership of property alleged to have been unlawfully taken in May 1956 can possibly be read to exclude a claim of ownership in the interim in September 1956—unless of course it is now somehow appropriate, in the second half of the twentieth century, to resurrect "the inability of the seventeenth century common law to understand or accept a pleading that did not exclude every misinterpretation

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"[18] As indicated above, the motion contained a statement to the effect that the property seized was, on March 25, 1957, the property of defendants. That, however, was immaterial, if true; for, as indicated above, the Federal search and seizure were made on September 5, 1956." [Footnote in original.]

capable of occurring to intelligence fired with a desire to pervert." *Paraiso* v. *United States*, 207 U.S. 368, 372.

Finally, to cap the climax of its demonstration (R. 457-458) that it was "not required to consider defendants' contention that the Federal search and seizure were unlawful," the court below added (R. 458), "However, we have considered it and find no merit in it."

No reasons in support of that conclusion were set forth in the opinion.

D. Inasmuch as the Federal search warrant was directed at property in the constructive custody of a State court, it was invalid because in violation of the constitutional rule of comity.

If the question of the validity or otherwise of the Federal search warrant is ever reached, then there is another reason why it was invalid, namely, that it was directed at property which at the time was in the constructive custody of a State court.[7]

Here the State District Court ordered the tapes impounded in the possession of the Sheriff "to be held at and released only upon the direction of the Attorney General of the State of Oregon or such higher Circuit or Supreme Court before whom the matter may be heard" (R. 24).

Thereafter, the State Circuit Court made it clear that neither the State Grand Jury nor the State Attorney

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[7] As we indicated in our Petition for Certiorari (p. 24, note 16, ¶(c)), this issue was not separately presented because in our view it was "subsidiary question fairly comprised" in what is now Question 3 (*supra*, pp. 2-3) in the sense of this Court's Rule 23(1)(c). Accordingly, the arguments under the present heading do not involve the disapproved "practice of smuggling additional questions into a case" after certiorari has been granted. *Irvine* v. *California*, 347 U.S. 128, 129.

General could use the impounded tapes in any way without a court order (R. 26-27, 28):

> "• • • if the Grand Jury of this County has turned any of that material or any of those things that were taken by this illegal search warrant over to the Government of the United States, the Grand Jury had no authority whatsoever to do anything of the kind. No one has any authority to dispose of that or use it in any way without an order of the Court. No order of the Court that I know of has ever been issued to anyone for that purpose.
>
> "• • • if the law in telecommunications has been violated, he must get an order of the Court before the Attorney General can use it. That is the order of the Court and that will be the order when it is prepared.
>
> • • • • •
>
> "I am asking that all of this be turned over to the Attorney General to be disposed of according to the law and by the order of this Court."

Accordingly, when the illegally seized tapes were placed in the First State Bank of Milwaukie in a box rented by the Oregon State Police (*supra*, p. 8), they were *in custodia legis*, subject to orders of the State courts.

While we have found no prior case of a Federal search warrant directed at property in the constructive custody of State courts, there are many adjudications to the effect that, when property is in the custody of a State court, it cannot be reached by process emanating from a Federal court. See, out of many cases, *Fischer* v. *American Ins. Co.*, 314 U.S. 549, 553-554; *Lion Bonding Co.* v. *Karatz*, 262 U.S. 77; *Palmer* v. *Texas*, 212 U.S. 118; *Taylor* v. *Carryl*, 20 How. 583; *Peale* v. *Phipps*, 14 How. 368; *Peck* v. *Jenness*, 7 How. 612; *Hagan* v. *Lucas*, 10 Pet. 400. The doctrine of comity forbids.

Situations have arisen, of course, and more can readily be imagined, where State custody might frustrate overriding Federal policies. See Warren, *Federal and State*

Court Interference, 43 Harv. L. Rev. 345 (1930), for a collection of such instances, of which *Ableman* v. *Booth*, 21 How. 506, and *Tarble's Case*, 13 Wall. 397, are perhaps the best known. See also *Harris* v. *Dennie*, 3 Pet. 292.

But this is not such a case. Here the State court's custody of property which had been illegally seized under a defective warrant furthered the Federal policy against unreasonable searches and seizures, a policy that is expressed both in the Fourth Amendment and in the Due Process Clause of the Fourteenth Amendment. Thus, unlike the cases instanced in the late Mr. Warren's scholarly paper, here the action of the State courts assisted in furthering rather than frustrating Federal interests.

Contrariwise, the execution of the Federal search warrant on property in the constructive custody of the State courts not only violated settled doctrines of comity, such action also frustrated the Federal policy, expressed in the Federal Constitution, which forbids unreasonable searches and seizures.

If, therefore, the present question is reached at all, there should accordingly be no hesitation in declaring the Federal search warrant invalid because of this additional infirmity.

CONCLUSION

For the foregoing reasons, the judgments below should be reversed, and the case remanded to the United States District Court for the District of Oregon, with directions to grant petitioners' motion to suppress.

Respectfully submitted.

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APPENDIX

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULE OF COURT INVOLVED

1. *Constitution of the United States:*

(a) Clause 2 of Article VI (the Supremacy Clause) is as follows:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

(b) The Fourth Amendment provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

(c) The Fourteenth Amendment provides in pertinent part:

"* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *".

2. *Constitution of Oregon:*

Section 9 of Article I provides:

"**Section 9. Unreasonable searches or seizures.** No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported by oath, or affirmation, and

particularly describing the place to be searched, and the person or thing to be seized."

3. *Federal Statutes*

(a) Section 2235 of Title 18 provides:

"§ 2235. Search warrant procured maliciously

"Whoever maliciously and without probable cause procures a search warrant to be issued and executed, shall be fined not more than $1000 or imprisoned not more than one year."

(b) Section 501 of Title 47 provides:

"§ 501. General penalty

"Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided in this chapter, by a fine of not more than $10,000 or by imprisonment for a term not exceeding one year, or both; except that any person, having been once convicted of an offense punishable under this section, who is subsequently convicted of violating any provision of this chapter punishable under this section, shall be punished by a fine of not more than $10,000 or by imprisonment for a term not exceeding two years, or both."

(c) Section 605 of Title 47 provides:

"§ 605. Unauthorized publication or use of communications

"No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or

foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication, broadcast or transmitted by amateurs or others for the use of the general public, or relating to ships in distress."

4. *Oregon Statutes*

(a) The provisions of the Oregon Revised Statutes (O.R.S.) here pertinent are as follows:

"141.030. Affidavit of probable cause. A search warrant cannot be issued but upon probable cause, shown by affidavit, naming or describing the person, and describing the property and the place to be searched."

* * * * *

"141.090. Penalties. (1) Any person who maliciously and without probable cause procures a search warrant to be issued and executed is guilty of a misdemeanor. * * *"

(b) The pertinent portions of Chapter 675 of the Oregon Laws of 1955, entitled "AN ACT Relating to the obtaining of telecommunications or radio communications without authority; prohibiting the use of evidence so obtained; and providing penalties," are as follows:

"Section 1 [Definitions] * * *.

"Section 2. (1) Except as otherwise provided in section 3 of this Act or subsections (2) and (3) of this section, no person shall:

"(a) Obtain or attempt to obtain the whole or any part of a telecommunication or a radio communication to which such person is not a participant, by means of any device, contrivance, machine or apparatus, whether electrical, mechanical, manual or otherwise, unless consent is given by at least one participant.

"(b) Tamper with the wires, connections, boxes, fuses, circuits, lines or any other equipment or facilities of a telecommunication or radio communication company over which messages are transmitted, with the intent to obtain unlawfully the contents of a telecommunication or radio communication to which such person is not a participant.

"(2) The prohibitions in this section shall not apply to officers, employes or agents of a telecommunication or radio communication company who perform the acts prohibited in this section for the purpose of construction, maintenance or conducting of their telecommunication or radio communication service, facilities or equipment; nor shall such prohibitions apply to subscribers or members of their family who perform the acts prohibited in this section in their homes.

"(3) The prohibitions in subsection (1)(a) of this section do not apply to the receiving or obtaining of the contents of any radio or television broadcast transmitted for the use of the general public.

"Section 3. [Court orders for the interception of telecommunications] • • •

"Section 4. [Liability of officer proceeding under expired or unrenewed court order] • • •

"Section 5. [Applications &c for court orders to be confidential] • • •

"Section 6. Evidence of the contents of any telecommunication or radio communication obtained by violation of section 2 of this Act and without a court order under section 3 of this Act shall not be admissible in any court of this state.

"Section 7. Violation of subsection (1) of section 2, or of section 4 or 5 of this Act is punishable, upon conviction, by a fine of not more than $3,000 or by imprisonment in the penitentiary for not more than three years, or by both."

(c) By Chapter 681 of the Oregon Laws of 1959, approved May 27, 1959, the foregoing provisions were substantially amended, and it is the amended wire-tapping statute which now appears as O.R.S. 165.535, 165.540, and 165.545.

Prior to the 1959 amendments, Section 1 of C.675, Ore. Laws 1955, was O.R.S. 165.535, while Sections 2 and 7 appeared in O.R.S. 165.540.

In this connection, it is to be noted that the text of the O.R.S. is revised after each session of the State legislature, by the use of loose-leaf pages.

5. *Rule of Court*

Rule 41 of the Federal Rules of Criminal Procedure provides in pertainent part as follows:

"Rule 41. Search and Seizure

* * * * *

"(c) Issuance and Contents. A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned."

* * * * *

"(e) **Motion for Return of Property and to Suppress Evidence.** A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."